92-1662

No. _____

Supreme Court, U.S.
FILED
APR 6 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

S. R. WITKOWSKI, WARDEN; STATE OF SOUTH CAROLINA; ATTORNEY GENERAL OF SOUTH CAROLINA,

Petitioners,

vs

LEWIS D. GOLDSMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

T. Travis Medlock
Attorney General

Donald J. Zelenka
Chief Deputy
Attorney General and
Attorney of Record

Office of the Attorney General
Post Office Box 11549
Columbia, S.C. 29211

(803) 734-3713

ATTORNEYS FOR
PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

I. May the Court of Appeals create an intolerable conflict and alter the mandates of Wright v. West, 112 S.Ct. 2482 (1992), and Jackson v. Virginia, 443 U.S. 307 (1979), when it requires the prosecution to negate all other hypothesis rather than viewing the evidence in the light most favorable to the state in collateral review?

II. In determining whether to grant a writ of habeas corpus to a state prisoner can a federal court fail to give any deference to the state court's application law to specific facts and review a state court determination de novo?

III. Is Due Process denied when the state trial judge makes a curative instruction to disregard hearsay testimony where the stricken testimony when there was no likelihood that the jury would not

follow the curative instruction and the evidence added little to the prosecution's case?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Citation to Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved Involved	3
Statement of the Case	5
Reasons Why the Writ Should Be Granted	13
Conclusion	38
Appendix A - Goldsmith v. Witkowski, 981 F.2d 697 (4th Cir. 1993)	A-1
Appendix B - Order Denying Petition for Rehearing	B-1

TABLE OF AUTHORITIES

CASES:	Page
Boyde v. California, ___ U.S. ___, 108 L.Ed 2d 316 (1990)	32
Brown v. Allen, 344 U.S. 443 (1953)	30
Bruton v. U.S., 391 U.S. 123 (1968)	36
Goldsmith v. Witkowski, et al., 981 F.2d 697 (4th Cir. 1993)	2
Greer v. Miller, 483 U.S. 756, 107 S.Ct. 3102 (1987)	passim
Jackson v. Virginia, 443 U.S. 307 (1979)	passim
Kuhlmann v. Wilson, 477 U.S. 436	29
Richardson v. Marsh, 107 S.Ct. 1702 (1987)	35
Stamper v. Muncie, 944 F.2d 170 (4th Cir. 1991)	20
State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974)	22
State v. Goldsmith, 301 S.C. 463, 392 S.E.2d 787 (1990)	passim
State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987)	passim
State v. Lane, 271 S.C. 68, 245 S.E.2d 114 (1978)	22

	Page
United States v. Brooks, 940 F.2d 598, (10th Cir. 1991)	22
U.S. v. Cardenas, 778 F.2d 1127 (5th Cir. 1985)	37
United States v. James, 764 F.2d 885 (D.C. Circuit 1985)	22
U.S. v. Osatz, 912 F.2d 534 (2nd Cir. 1990)	37
Winburn v. Minnesota Mutual Ins. Co., 261 S.C. 568, 201 S.E.2d 372 (1973)	36
Wright v. West, 112 S.Ct. 2482 (1992)	passim
UNITED STATES CONSTITUTION:	
Fourteenth Amendment	3
Sixth Amendment	3
UNITED STATES CODE:	
28 U.S.C. Section 2254	3
28 U.S.C. Section 1291	3
28 U.S.C. Section 2253	3
28 U.S.C. Section 1254(1)	3
SOUTH CAROLINA CODE:	
S.C. CODE ANN. Section 44-53-370 (1985 Cum. Supp.)	4
S.C. CODE ANN. Section 16-17-410	passim

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

S. R. WITKOWSKI, WARDEN; STATE OF SOUTH CAROLINA; ATTORNEY GENERAL OF SOUTH CAROLINA,

Petitioners,

vs

LEWIS D. GOLDSMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Attorney General of South Carolina, through below-signed counsel, on behalf of the named Petitioners hereby petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the judgment in which the court reversed the order of the District Court for the District of South Carolina and remanded the case for entry

of an order granting the writ of habeas corpus to South Carolina inmate, Lewis Goldsmith.

CITATION TO OPINIONS BELOW

The opinion of. the Court of Appeals for the Fourth Circuit reversing the district court's denial of habeas corpus relief is reported as Goldsmith v. Witkowski, et al., 981 F.2d 697 (4th Cir. 1993), and is reprinted as Appendix A to the Petition. The Order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc is unreported and reprinted as Appendix B. The opinion of the Supreme Court of South Carolina is reported as State v. Goldsmith, 301 S.C. 463, 392 S.E.2d 787 (1990).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided the matter on November 24, 1992, and amended its decision on January 5, 1993. A timely

petition for rehearing and suggestion for rehearing in banc was denied on January 7, 1993.

This matter arises from a petition for a writ of habeas corpus by a state prisoner brought pursuant to 28 U.S.C. Section 2254. The Court of Appeals had jurisdiction to review the decision of the District Court under 28 U.S.C. Section 1291 and Section 2253.

The Petitioners seek to invoke this Court's jurisdiction pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Due Process Clause of the Fourteenth Amendment to the United States Constitution which states: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

2. The Sixth Amendment to the United States Constitution which states, in its pertinent part: "In all criminal

prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."

3. S.C. CODE ANN. Section 44-53-370 (1985 Cum. Supp.) which states in its pertinent part:

> (a) [I]t shall be unlawful for any person:
>
> > (1) to manufacture, distribute, dispense or possess with intent to manufacture, distribute or dispense, a controlled substance.
> >
> > ....
>
> (d) ...
>
> > (3) Possession of more than ten grains of cocaine, ... twenty-eight grams or one ounce of marijuana ... shall be prima facie evidence of a violation of subsection (a) of this section ....

4. S.C. CODE ANN. Section 16-17-410 in its pertinent part states "the crime known to the common law as 'conspiracy' is hereby defined as a combination between two or more persons for the purpose of accomplishing a criminal or unlawful

object or an object neither criminal nor unlawful by criminal or unlawful means."

STATEMENT OF THE CASE

The Attorney General of South Carolina on behalf of the named Petitioners makes this Petition for Writ of Certiorari to ask this Court to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit which reversed the District Court and rejected the South Carolina Supreme Court's conclusions of law and findings of fact. We submit that the state court and district court properly applied the federal constitutional analysis in a collateral proceeding in holding that (1) there was constitutionally sufficient evidence to support the state trial jury convictions of possession with intent to distribute and conspiracy to distribute cocaine and marijuana, and (2) that a deputy's hearsay testimony did not require a new trial where a cautionary instruction

was given and the objected evidence added little weight to the state's case. We respectfully submit that certiorari is appropriate and should lead to a reversal of the opinion of the Fourth Circuit and affirmance of the Order of the United States District Court.

a. Procedural History.

The Petitioner, Lewis D. Goldsmith, #117479, is currently confined in the Cross Anchor Correctional Institution pursuant to orders of commitment from the Clerk of Court for Greenville County, South Carolina. The Petitioner was indicted at the October, 1988, term of the Greenville County Court of General Sessions for the offenses of possession with the intent to distribute marijuana, simple possession of marijuana, possession with the intent to distribute cocaine and simple possession of cocaine. He was also indicted for two counts of conspiracy. He proceeded to trial before the Honorable

James E. Moore, Presiding Judge, and a jury on December 12, 1988. In the trial court the Petitioner was represented by court-appointed counsel, C. Carlyle Steele, Esquire. The State was represented by Symnes Culbertson, Assistant Solicitor for the Thirteenth Judicial Circuit.

The Petitioner was found guilty as charged on all counts and was subsequently sentenced by the state court to four (4) years for possession of marijuana, twenty (20) years and a twenty thousand dollar ($20,000) fine for possession of marijuana with the intent to distribute, four (4) years for possession of cocaine, twenty (20) years and a fifty thousand dollar ($50,000) fine for possession of cocaine with the intent to distribute, ten (10) years for conspiracy to distribute marijuana, and ten (10) years for conspiracy to distribute cocaine. Said sentences are to be served concurrently.

The Petitioner served opposing counsel with timely Notice of Intent to Appeal said conviction and sentence on December 22, 1988. In the appeal, the Petitioner was represented by Tara Shurling of the South Carolina Office of Appellate Defense. In the appeal, the following exceptions were presented:

> I. The lower court erred, and thereby violated the Appellant's rights under the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina State Constitution, by denying the Appellant's motion for a mistrial subsequent to the improper introduction of hearsay testimony from a state witness where the receipt of this information into evidence clearly violated the Appellant's right to confront witnesses against him inasmuch as the source of the information did not testify.
>
> II. The lower court erred, and thereby violated the Appellant's rights to due process of law as protected by the Fourteenth Amendment to the United States Constitution as well as Article I, Section 3, of the South Carolina Constitution, by denying Appellant's motions for directed verdicts of acquittal on all charges against him where the evidence as presented by the state when

viewed in the light most favorable to the prosecution was insufficient to establish the Appellant's guilt of every element of the crimes charged beyond a reasonable doubt.

III. The lower court erred, and thereby violated the Appellant's rights to due process of law, as protected by the Fourteenth Amendment to the United States Constitution and Article I, Section 3, of the South Carolina Constitution, by entering judgment against the Appellant for both simple possession of marijuana and cocaine and the greater offenses of possession with the intent to distribute marijuana and cocaine, and in subsequently sentencing the Appellant to separate terms of incarceration for each of these offenses, where the Appellant's double prosecution and punishment for these offenses constituted a violation of his rights against being placed in double jeopardy as protected by the Fifth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 12, of the South Carolina Constitution.

(Tr. pp. 81-82). In the Brief of Appellant, filed on July 13, 1989, counsel for the Petitioner raised an issue as to each exception. On June 18, 1990, the Supreme Court of South Carolina entered its opinion affirming the convictions for possession with intent to distribute and

conspiracy to distribute both cocaine and marijuana, but vacated the convictions for simple possession of cocaine and marijuana as lesser included offenses. State v. Goldsmith, 301 S.C. 463, 392 S.E.2d 787 (1990). (J.A. pp. 89-91).

Goldsmith next filed a Petition for a Writ of Habeas Corpus in the District Court. In the Petition, he raised the following pertinent issues:

> A. Whether the lower court erred when it denied motion for mistrial.
>
> > 1. The state's witness intentionally made a statement that they had information that the Petitioner and co-defendant would be at the apartment at the time of the raid, counsel objected, and made a motion for a mistrial and that motion was overruled by the court, Petitioner contends that the curative charge did not save the prejudicial testimony from falling to a level of hearsay and becoming inadmissible testimony, and did prejudice the Petitioner to a point that it foreclosed the Petitioner from receiving a fair trial.
>
> B. Whether or not the state proved every element of the offenses that

the Petitioner was charged with beyond a reasonable doubt.

> 1. The state failed to prove that the Petitioner had any knowledge of the drugs that was found at another persons home, and in looking at the evidence in light most favorable to the state, there was not evidence that would allow the state to find the Petitioner guilty beyond a reasonable doubt.

(J.A. pp. 95-96). The Respondents made their Return asserting that neither ground established a valid claim for relief. (J.A. pp. 103-109). On January 18, 1991, the Honorable William M. Catoe, United States Magistrate Judge, entered a presumption of correctness to the state court findings of historical fact in which it concurred. (J.A. pp. 120-123). The Petitioner objected. (J.A. p. 125). The District Court concurred in the Report and dismissed the Petition. (J.A. pp. 126-127).

The Respondent appealed the denial of the writ to the United States Court of Appeals for the Fourth Circuit. In his

opinion, the panel decision, over the dissent of Circuit Judge Niemeyer, ordered that the writ of habeas corpus be granted on the basis of insufficient evidence to convict him of conspiracy and possession with intent to distribute marijuana and cocaine despite the majority's conclusion that Goldsmith was "alone in the apartment, except for the presence of a small child" and he was "sitting at a table laden with narcotics and narcotic paraphernalia in an apartment where other drugs and paraphernalia were later discovered," which imputed knowledge of the drugs to Goldsmith. The majority, however, reached the conclusion that he lacked "dominion and control over the drugs." 981 F.2d 701-702. Similarly, the court concluded that there was no evidence of a conspiracy. 981 F.2d at 702-703. Finally, the majority concluded that even though the trial court sustained no objection to hearsay testimony and timely

instructed the jury to disregard the answer, the error was not harmless. 981 F.2d 703-704. A petition for rehearing and suggestion for rehearing in banc was denied.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The opinion of the Fourth Circuit creates an intolerable conflict with this Court's decisions in Jackson v. Virginia, 443 U.S. 307 (1979), and Wright v. West, U.S. , 112 S.Ct. 2482 (1992).

In the proceedings in the lower court, the court was addressing the sufficiency of the evidence to convict in a conspiracy and possession with intent to distribute illegal drugs. Without giving any deference to the state appellate court's factual resolution of the issue of possession, the Court of Appeals required the state to negate all other inferences to be drawn from the evidence rather than having "all the evidence is to be

considered in the light most favorable to the prosecution." Wright v. West, 112 S.Ct. at 2492; Jackson, 443 U.S. at 319. As the factual record before this Court reveals, in drug prosecutions it is not unusual for the evidence to suggest other hypothesis than guilt. To suggest, as the opinion of the Court of appeals obviously does that the prosecution in collateral review must affirmatively reject those hypothesis would create havoc among sufficiency review in habeas cases which Jackson and Wright was intended to eliminate. This problem is likely to recur in the lower courts because of the further conflict between the state court decision in State v. Goldsmith, supra, and the panel decision of the Fourth Circuit as it relates to the fundamental issue of the existence of "constructive possession" in illegal drug prosecutions. In South Carolina alone, the calendar year of 1991 revealed 5,535 convictions. S.C. Office

of the Attorney General, Annual Report 1991, p. 160. The obvious fact that Goldsmith will be treated as binding precedent in the states of the Fourth Circuit would lead to a total lack of finality in these types of cases where the Court of appeals "shut his eyes" entirely to the state court application of law to fact.

The Petitioners recognize that this Court does not generally grant certiorari to review evidence and discuss specific facts. U.S. v. Johnson, 268 U.S. 220 (1925). However, certiorari is appropriate "where the standard appears to have been misapprehended or grossly misapplied." Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974). This is such a case.

In Wright v. West, 112 S.Ct. at 2492-3, the court clearly set forth the standard for evidentiary sufficiency it utilized:

> In Jackson, we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review. We said that "all of the evidence is to be considered in the light most favorable to the prosecution," 443 U.S. at 319, 99 S.Ct. at 2789 (emphasis in original); that the prosecution need not affirmatively "rule out every hypothesis except that of guilt," id., at 326, 99 S.Ct. at 2792; and that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution," ibid. Under these standards, we think it clear that the trial record contained sufficient evidence to support West's conviction.

PURPOSE

This Petition is made because the proceeding involves a question of exceptional importance in the relationship of comity and federalism in habeas corpus actions involving sufficiency of evidence challenges to state convictions, particularly in drug convictions. The majority opinion clearly reveals that the

decision is in intolerable conflict with the decision Wright v. West, supra, and Jackson, supra. Rather than viewing the evidence in the light most favorable to the prosecution and resolving inferences in favor of the prosecution, the panel decision construed the "logical" inference in favor of the state on the issue of "constructive possession" only when there were no other inferences which could be drawn from the same set of facts. This is particularly revealing in the language of the Court of Appeals in addition to the fact that one of the alleged inferences the Court of Appeals assumed negated the guilt of Goldsmith when, in fact, made the defendant criminally culpable.

A. Convictions for possession with intent to distribute drugs.

In concluding that the fact that the evidence revealed that only the defendant was in an apartment sitting at a dining room table laden with narcotics and drug

paraphernalia that adequately imputed knowledge of the illegal drugs, the Court of Appeals reached an unreasonable hypothesis on the basis of this wealth of actual knowledge that the only individual proven to have "knowledge" of the particular drugs on the table and the ability to touch the drugs at the time in question (Goldsmith) lacked "dominion and control or the right to exercise dominion and control over the drugs" as a matter of state law. In making that determination, the panel pointed out the alleged deficiencies in the state's case as being:

> 1. The state did not identify the lessor or lessee of the apartment.
>
> 2. It did not identify the small child who was in the apartment, or the relation between the child and any of the defendants.
>
> 3. It failed to establish any connection among Goldsmith and his two co-defendants or between the co-defendants.
>
> 4. No witness was able to say, however, who was in the apartment before the apartment or why Goldsmith was there (despite the obvious fact

that Goldsmith was the only person in the apartment before the police sought entry).

5. There was no evidence that all entrances to the apartment were under observation.

6. Both Cooper and Jordan were close to the building and Goldsmith may have been waiting for either co-defendant, or both, to return from outside.

7. The evidence did not reveal whether Goldsmith had been at the apartment on previous occasions or how he came to be there when he was arrested.

8. Goldsmith did not attempt to hide or dispose of the drugs or to evade the police.

Goldsmith, 981 F.2d at 702. In concluding the evidence was insufficient, the Court of Appeals, in a habeas setting, concluded that the evidence did not demonstrate that Goldsmith was "alone" in the sense he would allow the jury to infer he had the right to exercise dominion and control of the apartment or the contents of the apartment. The dissenting opinion of Judge Niemeyer correctly stated the only question properly before this Court based

upon the Petition for Writ of Habeas Corpus was the question of the defendant's actual knowledge of the drugs, not whether he possessed adequate dominion and control under state law to prove constructive possession. Id. at 704-706. This Court must limit its review in a habeas setting as to the issue of constitutional sufficiency and must resist any temptation to substitute the Court's interpretation of the evidence for that of a South Carolina jury. See Wright v. West, 112 S.Ct. 2482, 2492 (1992). In Stamper v. Muncie, 944 F.2d 170 (4th Cir. 1991), the Court stated that:

> Because one or more other, non-incriminating inferences might be drawn, Stamper contends it was unreasonable of the jury to accept the inferences suggested by the prosecution. He goes so far as to suggest that an inference may only qualify as a "logical" inference when no other inferences fairly may be drawn from the same set of facts. But in Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court ruled the prosecution is not required to negate every hypothesis except that of guilt.

944 F.2d at 175. For the appropriate inferences factually summarized in the dissenting opinion at 981 F.2d at 704-706, it is clear that the only people in Cooper's apartment immediately before the search were Goldsmith and a small child. At the time of the search, Goldsmith was found sitting at the kitchen table. In front of him on the table were cocaine powder, drug paraphernalia, rolling papers, and a tube straw. On the floor, right beside him, were two bags of marijuana. In addition to the drugs found in front of the defendant, the police seized additional cocaine and marijuana, aluminum foil packages with cocaine in them, scales, a plastic cup with marijuana seeds, a hand gun and cash. Upon arresting Goldsmith, officers discovered he had $200 in cash hidden in his sock.

It is clear that "proximity" under certain circumstances may be adequate to constitute constructive possession of a

drug. United States v. James, 764 F.2d 885 (D.C. Circuit 1985); also United States v. Brooks, 940 F.2d 598, 600 (10th Cir. 1991). Here, the circumstantial evidence, as properly analyzed by the state court, adequately proved under the Jackson standard that the defendant's knowledge of the drugs and paraphernalia on the laden table in an apartment in which he at the time the drugs were laden were under his sole control adequately satisfied constructive possession. State law is consistent with this conclusion. See State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987); State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974); State v. Lane, 271 S.C. 68, 245 S.E.2d 114 (1978). The ability of the Petitioner to see these drugs in his plain view adequately inferred his actual knowledge of the cocaine and marijuana in his immediate vicinity and available for his own view adequately satisfied the West-Jackson

standards. The panel decision requires state courts to negate all other hypotheses existing in the evidence for the state conviction to survive the Goldsmith analysis. Simply put, the Jackson standard requires more than merely resolving conflicts of evidence in favor of the state, it requires "that the prosecution need not affirmatively rule out every hypothesis except that of guilt, and that a reviewing court faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Wright v. West, 112 S.Ct. at 2492. Under these standards, Petitioners submit that the trial record contains sufficient evidence to support Goldsmith's guilt as determined by the state court and

the district court and the dissent in the panel decision.

B. CONSPIRACY TO DISTRIBUTE DRUGS.

Similarly, the Court of Appeals failed to apply the Jackson standard as it related to the conspiracy conviction. In making its conclusion that the evidence was insufficient to prove conspiracy, the Court concluded no circumstantial evidence was shown after the existence of a conspiracy. Interestingly, the Court concluded that "it is true, as previously noted, that the jury could have inferred Goldsmith's knowledge of the drugs. A reasonable juror could have believed Goldsmith was "a user waiting to make a purchase, a friend of the owner or lessee of the apartment, or perhaps an interloper." Goldsmith, 981 F.2d at 703. Despite the obvious that a "user waiting to make a purchase" of drugs clearly infers "a combination between two or more persons for the purpose of accomplishing a

criminal act ... , the definition of conspiracy in South Carolina, pursuant to S.C. CODE ANN. Section 16-17-410, the majority clearly reveals its inversion of the Jackson standard by requiring the state to again affirmatively rule out every hypothesis except that of guilt. As revealed in the dissent, "the jury could have properly concluded that Cooper was involved in a drug operation, a finding necessary to support a conspiracy conviction. When Cooper recognized that law enforcement officials had arrived at the scene, he ran to the apartment in an effort to exclude them and thereby protect the drug activity inside. From all the circumstantial evidence, a rational jury could, and did, conclude that Goldsmith was involved in the conspiracy." Clearly, the majority's complete failure to acknowledge the effect of the evidence of Cooper's actions on the conspiracy case

reveals that it did not properly apply the Wright-Jackson standard.

2. Certiorari is warranted because the Court of Appeals Opinion failed to give any deference to the Opinion of the Supreme Court of South Carolina application of law to facts.

The Petitioners request this Court to address the situation left unaddressed in West v. Wright, supra, as to whether the state appellate court's resolution of law to the facts is entitled to any deference in federal habeas corpus review. In the opinion of the Supreme Court of South Carolina in State v. Goldsmith, supra, the state concluded that the factual situation supported its conclusion that there was "constructive possession" of the controlled substances as a matter of substantive state law. (J.A. pp. 89-90). Here, the Court of appeals rejects that finding, concluding in its de novo review that there was not adequate evidence of

"dominion and control" despite the inalterable fact that Goldsmith was alone in the apartment within reach of a table strewn with cocaine and drug paraphernalia and bags of marijuana by his side.

Relying upon state law, State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987), the state court concluded:

> Viewing the evidence in the light most favorable to the State, it may be reasonably inferred appellant had actual knowledge of the .1 gram of cocaine in plain view on the table and the 113.4 grams of marijuana in plain view on the floor in his immediate vicinity. Possession of this contraband, including the paraphernalia also in plain view, is therefore imputed to appellant. State v. Kimbrell, supra. This evidence supports the submission of possession with intent to distribute marijuana and possession with intent to distribute cocaine to the jury. Matthews v. State, supra; State v. Adams, supra. Submission of the conspiracy charges was proper based on the evidence appellate was alone in another's residence with controlled substances and paraphernalia in his constructive possession when Cooper attempted to prevent the officers from entering the apartment. See State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980) (conspiracy may be shown by circumstantial evidence including the

> parties' conduct). We conclude the trial judge properly denied the motion for directed verdict on all counts.

State v. Goldsmith, 301 S.C. 466-467, 392 S.E.2d at 789.

The Court of Appeals disregarding these state law conclusions, instead chose on its own, to enter the state court factual foray and resolved there was no evidence of dominion and control. The Court of Appeals took issue with the state court stating:

> The state court in this case, however, did not point to any evidence from which a jury could infer dominion or control. Nor do we find such requisite record evidence of that element of the state offense as would meet the Jackson standard.

Goldsmith, 981 F.2d at 701.

The problem with the analysis is that the state court, in concluding that Goldsmith's presence in the apartment and proximity in the drugs so obviously showed dominion and control over the items -- he was the sole person in the apartment

(except for a small child) and the drugs were physically within his reach and plain view [or obvious control]. To the converse, Goldsmith's dominion and control over the drugs, as determined by the state court proved his knowledge of the drugs. Under Jackson, this predicate is so obvious so as to need no restatement in the state court opinion. The Court of Appeals blatantly rejected this reasonable hypothesis and clearly by the opinion, in de novo review required the state to disprove other hypothesis before it would entitle it to accept the state court opinion. The problem is the factual circumstances in Goldsmith now define the substantive law of constructive possession in South Carolina -- the Court of Appeals has chosen to re-write South Carolina law and state that it is not. Habeas corpus review must entitle these discrete state court findings to "absolute respect." Kuhlmann v. Wilson, 477 U.S. 436, 446

(Opinion of Powell, J.). To do otherwise would preclude a state court from refining and defining its substantive state law. Here, these state court findings of constructive possession must be "presumed correct" and can be overcome only by "convincing evidence." 28 U.S.C. Section 2254(d). Clearly then, these conclusions of the state court (which defined the law of constructive possession) must be viewed with deference. As stated before, a habeas judge need not -- and indeed may not -- shut his eyes" entirely to state court applications of law to fact. Brown v. Allen, 344 U.S. 443, 508 (1953) (Opinion of Frankfurter, J.). To the extent that the question of deference left unresolved in Wright v. West, supra, and Brown v. Allen, supra, remain, this case presents a fitting situation ripe for its reconsideration.

3. Certiorari is also appropriate to consider whether the curative

instruction was adequate to cure the effect of hearsay testimony.

In its opinion, the Court of Appeals cast aside the state court conclusion of the objected evidence as "the resulting prejudice was not of such a magnitude as to affect the outcome of the trial in light of the competent evidence discussed above," 301 S.C. at 467, 392 S.E.2d at 789, and instead created an aura of misconduct asserting that the entirety of the convictions rested upon the objected statement "we had information that Mr. Goldsmith and Mr. Cooper would be present at the time." Goldsmith, 981 F.2d at 703. Clearly, the mandates of harmless error review set forth in Greer v. Miller, 483 U.S. 756 (1987), were not carried out because the actual evidence before the trial jury actually revealed (1) that Goldsmith was present and (2) that Cooper was at the scene also. (J.A. pp. 9-15). The jury did not gain anything from the

brief comment and the prosecution sought nothing from it, except to unartfully explain why law enforcement was present to serve the warrant at that time. Clearly, it had no effect on the convictions. Particularly, it gave no effect to the curative instruction given by the trial judge to disregard the answer. Not only did the Court of Appeals disregard the trial court's instruction, it erroneously assumed that the jury did also. Jurors are assumed to have listened and followed the instructions. Boyde v. California, ___ U.S. ___, 108 L.Ed 2d 316 (1990). A review of this record suggests that the state trial and appellate court, as well as the federal district court was correct in its assessment of a lack of prejudice.

On appeal to the Supreme Court of South Carolina, the Court concluded that although it was improper for the prosecutor to pose such a question as to why they executed the search warrant, "the

resulting prejudice was not of such a magnitude as to effect the outcome of the trial in light of the competent evidence." (J.A. p. 91). The District Court properly came to the same conclusion. (J.A. pp. 122-123, 126-127). The State submits that these conclusions were correct and Goldsmith is not entitled to federal habeas relief.

Deputy Tony Rogers of the Greenville County Sheriff's Department testified that he and other deputies proceeded to 192 Oakview Village Apartments in Greenville County to execute a search warrant at the residence. (J.A. pp. 20-21). During further direct examination, the following colloquy occurred:

> [Assistant Solicitor]: When you say that you executed the search warrant, does that mean that you had special duties?
>
> [Deputy Rogers]: That means that I go in, I actually serve the warrant, read it to the person in the residence, or in charge of the residence. Then I sit at a table, if we can find

> one convenient, and try to watch the suspects if there are any present, and I also log the items that are seized on to the inventory section of the search as they are brought to me by the other officers.
>
> [Assistant Solicitor]: I want to ask you why did y'all serve the search warrant that day?
>
> [Deputy Rogers]: We had information that Mr. Goldsmith and Mr. Cooper would both be present at the time.
>
> [Defense Counsel]: If Your Honor please, I would ask that that be stricken and the jury be instructed to disregard that. It is hearsay and inadmissible under any exception to the hearsay rule.
>
> The Court: Yes, sir, sustained, and the jury is instructed to disregard that answer.

(Emphasis added). (J.A. p. 22, l. 22 - p. 23, l. 15). Outside the presence of the jury, defense counsel moved for a mistrial on the grounds that the challenged testimony was prejudicial and its effect could not be cured. (J.A. p. 24). The trial judge denied the motion for a mistrial. (J.A. p. 25).

The Supreme Court of South Carolina rejected the claim in the direct appeal. The state court concluded:

> An instruction to disregard incompetent evidence is usually deemed to have cured any prejudice in its admission. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). Although it was improper for the solicitor to pose such a question, the resulting prejudice was not of such a magnitude as to effect the outcome of the trial in light of the competent evidence discussed above. See State v. Dawkins, supra.

In Greer v. Miller, 483 U.S. 756, 107 S.Ct. 3102, 3109, n. 8 (1987), the United States Supreme Court in a habeas proceeding stated that "we normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, Richardson v. Marsh, 107 S.Ct. 1702

(1987), and a strong likelihood that the evidence would be "devastating to the defendant, Bruton v. U.S., 391 U.S. 123 (1968)." Here, the brief remark of Deputy Rogers to explain the course of the investigation, Winburn v. Minnesota Mutual Ins. Co., 261 S.C. 568, 201 S.E.2d 372 (1973), was neither "devastating" nor of the type of comment that would create a probability that the jury would be unable to follow the instructions.

The Court of Appeals sought to leisurely mischaracterize the objected evidence as evidence that the police possessed information tying Goldsmith to an ongoing drug conspiracy which was not revealed. First, the stricken testimony was merely that they executed the warrant at that time because they thought Goldsmith, and Cooper would be at the apartment. There was no stricken hearsay testimony about Goldsmith and drugs, only that he might be present -- a fact

subsequently proven. It should be noted that earlier unobjected testimony about the earlier controlled buy that led to the search warrant was introduced. (J.A. pp. 7-8). Here, the brief remark did not have the implications or effect Goldsmith now seeks to place upon it. The trial judge's remark in striking the testimony eliminated the limited possibility of such impression which could have also innocently been that warrants are only served when someone is home.

Here, the evidence was not of such magnitude to be "devastating" or that the jury would have been unable to follow the instruction to disregard. Greer, supra. U.S. v. Cardenas, 778 F.2d 1127 (5th Cir. 1985) (possible prejudice of questions concerning a witness's prior drug arrests cured by instructions). U.S. v. Osatz, 912 F.2d 534 (2nd Cir. 1990). The evidence of guilt was far from being "weak" as the Court of Appeals suggests

for the reasons set forth in the first argument, as the dissent properly.

CONCLUSION

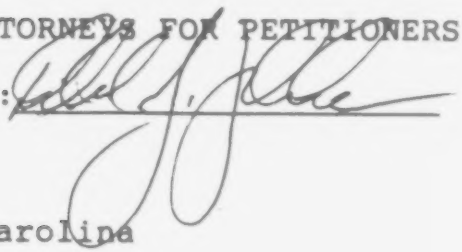
For each of the foregoing reasons and questions presented, we respectfully request this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

ATTORNEYS FOR PETITIONERS

By: 

April 6, 1993

Columbia, South Carolina

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Lewis D. Goldsmith,

Petitioner-Appellant,

v.

S.R. Witkowski, Warden; State of South Carolina; Attorney General of South Carolina,

Respondents-Appellees.

No. 91-7578

Appeal from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., Senior District Judge. (CA-90-1852-6-K)

Argued: May 7, 1992

Decided: November 24, 1992

Before MURNAGHAN and NIEMEYER, Circuit Judges, and SPROUSE, Senior Circuit Judge.

Reversed and remanded by published opinion. Senior Judge Sprouse wrote the opinion, in which Judge Murnaghan joined. Judge Niemeyer wrote a dissenting opinion.

COUNSEL

ARGUED: Steven H. Goldblatt, Director, Appellate Litigation Clinical Program, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant. Donald John

Zelenka, Chief Deputy Attorney General, Columbia, South Carolina, for Appellees. ON BRIEF: Eric J. Glassman, Student Counsel, Philip W. Owens, Student Counsel, Appellate Litigation Clinical Program, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant. T. Travis Medlock, Attorney General, Columbia, South Carolina, for Appellees.

OPINION

SPROUSE, Senior Circuit Judge:

Lewis D. Goldsmith appeals from the district court's dismissal of his 28 U.S.C. Section 2254 petition for habeas corpus. In the district court, Goldsmith challenged convictions by a South Carolina state court for possession of narcotics with intent to distribute and conspiracy to distribute narcotics. We hold that the evidence was constitutionally insufficient to support the convictions, and that part of the State's evidence presented at trial violated Goldsmith's Sixth Amendment right to confront witnesses. Accordingly, we reverse.

Police in Greenville County, South Carolina, arrested Goldsmith and co-defen-

dants Timmy Cooper and Adele Jordan on drug charges in 1988. Goldsmith was indicted on six counts and was tried separately from his co-defendants; a state court jury found him guilty on all charges. He received concurrent sentences of four years for possession of marijuana, twenty years and a $20,000 fine for possession of marijuana with intent to distribute, ten years for conspiracy to distribute marijuana, four years for possession of cocaine, twenty years and a $50,000 fine for possession of cocaine with intent to distribute, and ten years for conspiracy to distribute cocaine. On appeal the South Carolina Supreme Court affirmed the convictions for possession with intent to distribute and conspiracy to distribute marijuana and cocaine, but vacated the two simple possession convictions as lesser included offenses. Goldsmith's petition for habeas corpus relief in the district court challenged the remaining four convictions. He

contended that, under the standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the evidence presented at trial was insufficient to sustain the convictions, and that the elicitation of hearsay testimony from a police officer violated his Sixth Amendment right to confront witnesses. The district court dismissed his petition, and he appeals.

To assess Goldsmith's challenge, we review the evidence produced at trial "in light most favorable to the prosecution." *Jackson*, 443 U.S. at 319. The trial evidence consisted of both physical evidence and uncontested testimony from the five police officers who searched the apartment where Goldsmith was arrested. It demonstrated that on July 22, 1988, five narcotics deputies of the Greenville County Sheriff's Department searched an apartment in Taylors, South Carolina. The officers made the search pursuant to a valid warrant.

Two officers approached the apartment building from the front and three from the rear. The former testified that Goldsmith's co-defendant Timmy Cooper was outside when they arrived. Upon seeing the police, Cooper ran into the apartment through the front door. The three officers assigned to the rear of the building entered the apartment through the back door after overcoming Cooper's attempt to bar their entry.

The first officer into the apartment testified that as he entered, Goldsmith was sitting at a dinning room table. A small child was sitting on a sofa. The second officer into the apartment testified that as he entered, Goldsmith was standing next to the table and was "looking toward us to see what was going on as I went through the door." They subsequently arrested Goldsmith, Cooper, and Jordan. A body search pursuant to Goldsmith's arrest

uncovered $200 in his sock. No drugs were found on his person.

Both narcotics and drug paraphernalia were seized. From the dinning room table, the officers seized a tenth of a gram of cocaine (1.54 grains), a scale, a straw, and rolling papers. Two bags of marijuana were recovered near one of the table legs. The larger of the two bags was concealed in a shopping bag and contained 310.92 grams of marijuana; the smaller bag contained 113.4 grams. More evidence was found in a closed kitchen cabinet, the freezer, and the master bedroom. Officers seized cocaine wrapped in aluminum foil, a bag containing cocaine, a scale, a revolver, a covered plastic coffee cup containing marijuana seeds, a small bag of marijuana, and a lunch box containing plastic sandwich bags with the corners cut out.

Both the cocaine and the marijuana were in Goldsmith's plain view. The officers

testified that the one-tenth of a gram of cocaine on the dining room table was in Goldsmith's plain sight as the search began. One testified that the larger bag of marijuana was in a shopping bag on the floor, but that Goldsmith could not have avoided seeing the smaller bag from where he was standing.[1]

At trial, the officers testified that the apartment was not Goldsmith's residence; they did not identify who owned or rented the apartment. None of the officers could say that at the time they arrived at the apartment building Goldsmith was in the apartment. One testified, "I presume he was inside, we didn't see him outside."

---

[1]Another officer testified that both bags of marijuana were in the shopping bag on the floor and were therefore not in plain view, although they were within Goldsmith's reach. Because *Jackson* requires us to review the evidence in the light most favorable to the prosecution, we accept the testimony that the smaller bag of marijuana was in Goldsmith's plain view.

Another, when asked who was in the residence when the police arrived, answered, "I can't say, I mean, when I got there."

A

Looking first the evidence to determine if it is sufficient to uphold Goldsmith's two convictions for possession with intent to distribute cocaine and marijuana, we view it "in the light most favorable to the prosecution," and consider whether "*any* rational trier of fact could have found the essential elements of that crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

Under South Carolina Law, a conviction for the crime of possession with the intent to distribute, of course, requires proof of possession of drugs, and either actual or constructive possession is sufficient. S.C. Code Ann. § 44-53-370(a)(1); *State v. Ellis*, 207 S.E.2d 408, 413 (S.C. 1974). Because Goldsmith did not have actual possession of

the drugs in the apartment, proof of his constructive possession was required. A person has constructive possession of drugs if he has knowledge of the presence of the drugs and dominion and control, or the right to exercise dominion and control, over the drugs. *Ellis*, 107 S.E.2d at 413; *see also, State v. Kimbrell*, 362 S.E.2d 630, 631 (S.C. 1987) (holding that the possession element of the crime of trafficking in cocaine requires proof of power and intent to control). Constructive possession may be established by circumstantial evidence. *Ellis*, 107 S.E.2d at 413.

The South Carolina Supreme Court, in concluding that the convictions for possession with intent to distribute narcotics were sufficiently supported by the evidence, considered Goldsmith's presence in the apartment and his proximity to the narcotics and drug paraphernalia, which he could plainly see. Under South Carolina

Law, a jury may properly infer knowledge from such circumstances. *See, State v. Foster*, 237 S.E.2d 589, 593 (1977). The state courts in this case, however, did not point to any evidence from which a jury could infer dominion or control. Nor do we find such requisite record evidence of that element of the state offense as would meet the *Jackson* standard.[2] Essentially, the government only proved Goldsmith's presence

---

[2]It is true that possession of more than twenty-eight grams of marijuana or ten grains of cocaine establishes a prima facie case of intent to distribute. S.C. Code Ann. §44-53-370(d)(3). The quantity of marijuana present in the apartment more than satisfied this threshold requirement. Although the amount of cocaine recovered was less than the statutory minimum for establishing a prima facie case of intent to distribute, the jury could well have relied on Goldsmith's putative possession of the drug paraphernalia to infer that he had an intent to distribute cocaine. *See, State v. Adams*, 352 S.E.2d 483, 485 (S.C. 1987). Missing from the necessary and cumulative structure of proof, however, was the initial requirement for the proof of possession. Proof of possession, in turn, was dependent on proof of Goldsmith's dominion and control over the drugs or drug paraphernalia.

in the apartment and his awareness of the drugs. Under South Carolina law, the mere presence of a person in an area containing drugs, absent evidence of his dominion and control over them, is insufficient to prove his possession of the drugs. *State v. Tabory*, 196 S.E.2d 111, 113 (S.C. 2973). Again, even presence coupled with knowledge of the drugs is insufficient to sustain a possession conviction; the State must also prove dominion and control. *See, Kimbrell*, 362 S.E.2d at 632. Even if this were not state law, the due process protections of *Jackson*, in our view, would require the invalidation of convictions based solely on evidence of mere presence, as was established in this case.

Proof of dominion and control, of course, may include evidence that the accused controlled the premises where the drugs were found or that he had a special relationship with the owner or lessor of the

premises. *See State v. Brown*, 22 S.E.2d 674, 676 (S.C. 1976) (reversing possession conviction for insufficient evidence where defendant was a passenger in a car containing eight pounds of marijuana, but where State did not show that defendant had special relation with car's owner or its driver or that defendant exercised control over the car); *cf. State v. Hudson*, 284 S.E.2d 773, 775 (S.C. 2981) (holding that evidence of heroin, seized from apartment shared by the defendants, was sufficient to show control and possession). The South Carolina courts have also accepted other proof of dominion and control as sufficient to support a finding of possession. *See State v.Ellis*, 207 S.E.2d 408, 413 (S.C. 1974) (reversing possession conviction where appellant resided in apartment in which heroin sales occurred and was present during sales, but where State did not show that appellant participated in the sales or in

any other way exercised control); *cf. Kimbrell*, 362 S.E.2d at 631 (holding that evidence, which showed accomplice told defendant to watch cocaine while former went outside, was sufficient to support possession conviction). We have no doubt that such holdings comport with the *Jackson* standard.

In this case, however, the prosecution presented only an evidentiary picture of an accused sitting at a table laden with narcotics and narcotic paraphernalia in an apartment where other drugs and paraphernalia were later discovered. The State did not identify the lessor or the lessee of the apartment. It did not identify the small child who was in the apartment, or the relationship between the child and any of the defendants. Further, the State failed to establish any connection among Goldsmith and his two co-defendants, or between the co-defendants. At best, the State's

evidence showed Goldsmith's presence in an unknown person's apartment and his knowledge of drugs and drug paraphernalia in the apartment.

It is true that Goldsmith was alone in the apartment, except for the presence of the small child, at the time of the officers' entry. No witness was able to say, however, who was in the apartment before the police entered or why Goldsmith was there. On officer testified that he only "presumed" that Goldsmith was inside before they entered, and another, when asked who was inside before the search began responded, "I can't say." There was no evidence that all the entrances of the apartment building were under observation. Both Cooper and Jordan were close to the building, and Goldsmith may have been waiting for either co-defendant, or both, to return from outside. The record evidence does not indicate whether Goldsmith had been

at the apartment on previous occasions or how he came to be there when he was arrested.[3] Moreover, Goldsmith did not attempt to hide or dispose of the drugs or to evade the police. The trial evidence simply did not demonstrate that Goldsmith was "alone" in a sense that would have allowed the jury to infer that he had the right to exercise dominion and control over the apartment or the contents of the apartment.

Because the trial evidence was constitutionally insufficient to support a finding that Goldsmith had dominion and control over the marijuana or the cocaine, we find that there was insufficient evidence to find that he had possession of either drug. Therefore, we reverse the two

---

[3]On officer testified that the police "had information that Mr. and Mrs. Cooper would be present at the time" of the search, but the jury was properly told to disregard the statement. *See* discussion *infra* part II.

convictions for possession with intent to distribute.

Likewise, after viewing the evidence "in the light most favorable to the prosecution," we find the evidence insufficient to support the conspiracy convictions. *Jackson*, 443 U.S. at 319.

Conspiracy is defined under South Carolina law as "a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object or an object neither criminal nor unlawful by criminal or unlawful means." S.C. Code Ann. § 16-17-410. In order to convict a person of conspiracy, the State must first show the existence of a conspiracy. *State v. Hiott*, 276 S.E.2d 163, 166 (S.C. 1981). The Supreme Court of South Carolina has held "that a formal express agreement is not necessary to establish the conspiracy, and that it may be shown by circumstantial evidence and the conduct of the parties."

State v. Oliver, 267 S.E.2d 529, 530 (S.C. 1980). After the prosecution establishes the existence of a conspiracy, it need prove only a slight connection between the conspiracy and the defendant to convict him of knowing participation in the conspiracy. *State v. Sullivan*, 282 S.E.2d 838, 843 (S.C. 1981) (quoting *United States v. Dunn*, 564 F.2d 348, 357 (9th cir. 1977)).

The State here, however, presented no evidence, even circumstantial, to show the existence of a conspiracy. Even had there been one, there was no evidence to show Goldsmith's participation. It is true, as previously noted, that the jury could have inferred Goldsmith's knowledge of the drugs. A reasonable juror could have believed Goldsmith was a user waiting to make a purchase, a friend of the owner or lessee of the apartment, or perhaps even an interloper. A conclusion, however, that Goldsmith was part of a conspiracy to

distribute marijuana or cocaine, requires bridging an evidentiary gap with rank speculation.

II

Goldsmith also asserted in his petition that his Sixth Amendment right to confront witnesses was violated when the State introduced hearsay evidence, and that the trial court erred in denying defendant's motion for a mistrial. Goldsmith complains that the entire trial was tainted when the state prosecutor asked a deputy, "[W]hy did y'all serve the search warrant that day?" and the officer responded, "We had information that Mr. Goldsmith and Mr. Cooper would be present at the time." Although the trial court sustained defense counsel's objection and instructed the jury to disregard the answer, Goldsmith contends that the officer's statement "left an indelible impression fixed in the jurors' minds that this could not be a case of mere

presence because the police had additional evidence tying Goldsmith to the apartment, to Cooper, and to an ongoing drug conspiracy."

We agree with the South Carolina Supreme court that the blatant attempt by the prosecutor to strengthen an obviously weak case was egregious constitutional error. We disagree, however, with its conclusion that the error was harmless.[4]

The presumption of cure by a court's instruction is overcome when there is an "overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987)

---

[4] In order to show that a constitutional error was not prejudicial, the State must prove that it is not harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

(quoting *Richardson v. Marsh*, 481 U.S. 200, 208 (1987)); *Bruton v. United States*, 391 U.S. 123, 136 (1968)). Here the officer's answer was devastating to the defense. By telling the jury that the police knew Goldsmith would be at the apartment at a specific time, it supplied a missing link in the State's case. The jurors could then believe that Goldsmith was personally known to the police and was known to be connected with the apartment and the drug operation inside. The statement linked Goldsmith to Cooper, and intimated that the two somehow operated out of the apartment together. There was no longer the possibility that Goldsmith was the identified target of a police investigation and a confederate of Cooper. The statement was not harmless error with regard to the conspiracy convictions. The jury could have inferred from this testimony that a conspiracy

existed and that Goldsmith participated in it.

Nor was the statement harmless error with regard to the convictions for possession with intent to distribute narcotics. The officer's response allowed the jury to infer that Goldsmith had a special relationship with the apartment and with cooper, and therefore, that Goldsmith had the right to exercise dominion and control over the apartment and its contents. Evidence of dominion and control would have established the other missing link in the State's case, providing the crucial element of the offense of possession with intent to distribute narcotics. At best, the presentation of the deputy's testimony represented loose prosecution. At worst, it could be seen as an attempt to present through the back door what the State had failed, for whatever reason, to present through appropriate prosecutorial evidence.

III

The judgment of the district court is reversed and the case remanded for entry of an order granting the writ of habeas corpus.

NIEMEYER, Circuit Judge, dissenting:

Lewis D. Goldsmith was convicted by a South Carolina state jury of six counts - two counts each of possession of marijuana and cocaine, possession with intent to distribute, and conspiracy to distribute. On appeal, the South Carolina Supreme Court vacated the "simple possession" convictions as lesser included offenses and affirmed the convictions on the remaining courts. On this petition for a writ of habeas corpus, Goldsmith would now have us review his convictions again, principally because, he contends, the evidence was insufficient to support the convictions. As he stated in his petition:

> The state fail to prove that the Petitioner had any knowledge of the Drugs that was found at another Persons Home, and in

> looking at the Evidence in light most favorable to the State, there was not evidence that would allow the State to find the Petitioner guilty beyond a reasonable doubt.

Goldsmith has also complained about the jury's possible consideration of stricken testimony that he contends was prejudicial.

Considering Goldsmith's first argument, we begin by recognizing that two state courts have reviewed Goldsmith's convictions for sufficiency of the evidence and that our role is only to assure that South Carolina complied with federal constitutional requirements when convicting Goldsmith. *See Jackson v. Virginia*, 443 U.S. 307, 322-23 (1979). While the imposition of a sentence in the absence of substantial evidence of criminal conduct would deny Goldsmith due process, I submit that that was not the case here. We must carefully limit our review to the issue of constitutional sufficiency, scrupulously resisting any temptation to substitute our interpretation of the

evidence for that of the South Carolina jury. *See Wright v. West*, 112 S. Ct. 2482, 2492 (1992) ("In *Jackson*, we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review.") (Thomas, J., plurality opinion).

The evidence supporting Goldsmith's conviction stems from the July 22, 1988, search of Timmy Cooper's apartment. There is no dispute that state law enforcement officers conducted that search properly. The search was pursuant to a valid warrant, and probable cause to believe illegal activities were occurring within the apartment was established by a "controlled buy" of illegal substances in the apartment earlier that day.

The only people in Cooper's apartment immediately before the search were Goldsmith and a small child. At the time of the search Goldsmith was found sitting at the

kitchen table. In front of him on the table were cocaine powder, drug paraphernalia, rolling papers, and a "tube straw" (explained by the officers to be a straw that had been cut down for use in inhaling cocaine). On the floor, "right beside" the table, were two large bags of marijuana. In addition to the drugs found in front of the defendant, officers seized additional cocaine and marijuana, aluminum foil packages with cocaine in them, scales, a plastic sup with marijuana seeds, a handgun and cash. Upon arresting Goldsmith, officers discovered he had $200 in cash hidden in his sock.

In addition to the substantial quantities of drugs and drug-related paraphernalia found, the events surrounding Goldsmith's arrest provided evidence that he was involved with Cooper. When law enforcement officers arrived before the search in the parking area at Cooper's

apartment dressed in "raid jackets" which identified them as sheriff's deputies, Cooper, who was then outside, ran to the back door of the apartment and "slammed the door back on [the officer's] arm as [the officer] was trying to go in." Cooper then ran into the living room where he was restrained. A woman, possibly the mother of the small child, was outside of the apartment when the officers arrived and remained outside during the search and arrests.

The only evidence presented at trial was that of the State. But in support of his petition for a writ of habeas corpus Goldsmith contended:

> Petitioners Position is that on the Morning of July 22, 1988, He did stop by the Home of One Timmy Cooper, the CO-Defendant in this Case, However *to the best of His Knowledge there was no drugs found out in the Opening that he Could see*, that at the time in Question, That the Petitioner was on Parole and that He had called over to the CO-Defendants Home, and made arrangements to barrow the amount

> of Money that was needed to make His Ends Meet . . . .

(Emphasis added). His contention that he did not see any drugs and was not therefore involved with any drugs is directly contradicted by the testimony of the several officers, all of whom saw cocaine on the table and two large bags of marijuana on the floor.

The critical issue in this case is whether there is sufficient evidence from which a jury could infer that Goldsmith was in possession of the drugs. Even if the jury found he was in possession only of the drugs at and about the table where he was seated, it could permissibly find both possession with intent to distribute and conspiracy. Next to the table and clearly visible were the two bags of marijuana, the smaller of which contained 113.4 grams (several ounces). Possession of one ounce of marijuana establishes a prima facie case under South Carolina law of intent to

distribute. *See* S.C. code § 44-53-370(d)(3) (1988) (amended 1990). While the amount of cocaine on the table at which Goldsmith was seated, .1 gram (1.54 grains), was not by itself sufficient to establish a prima facie case of intent to distribute, *see* S.C. Code § 44-53-370(d)(3) (possession of ten grains of cocaine establishes a prima facie case of intent to distribute), when drug paraphernalia are present, no particular amount of cocaine is necessary to support a finding of intent to distribute. *See State v. Adams*, 352 S.E.2d 483,485 (S.C. 1987). In this case, in addition to the drug paraphernalia on the table in front of Goldsmith, scales, packaging, and more cocaine were seized from the apartment. Evidence was also admitted that showed that the officers had made a controlled buy from the apartment earlier.

To find a conspiracy, a jury need not find an explicit agreement, but may infer an

agreement from circumstantial evidence and the parties' conduct. *See State v. Oliver*, 267 S.E.2d 529, 530 (S.C. 1980). The jury could have properly concluded that Cooper was involved in the drug operation, a finding necessary to support a conspiracy conviction. When Cooper recognized that law enforcement officials had arrived at the scene, he ran to the apartment in an effort to exclude them and thereby protect the drug activity inside. From all the circumstantial evidence, a rational jury could, and did, conclude that Goldsmith was involved in a conspiracy.

A finding of possession by Goldsmith therefore remains the crucial element. To establish possession under South Carolina law, the State must show both the power to control the drugs and the intent to control their disposition or use. In this case both may be inferred from the presence of drugs in front of Goldsmith on the table at which

only he was sitting. "Because actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use, knowledge may be equated with or substituted for the intent element. Possession may be inferred from the circumstances." *State v. Kimbrell*, 362 S.E.2d 630, 631 (S.C. 1987) (citation omitted). Viewed in a light most favorable to the State, the evidence properly admitted in this case permits the jury to infer that Goldsmith, the only adult in the apartment, was in possession of at least the drugs at the table, if not all the drugs found throughout the apartment.

Rejecting the permissible inferences, the majority opinion has, in my judgment, failed to take the evidence in a light most favorable to the State and has concluded that, "because the trial evidence was constitutionally insufficient to support a finding that Goldsmith had dominion and

control over the marijuana or the cocaine" the convictions must be reversed. I respectfully disagree.

Goldsmith's second argument is that the failure of the judge to order a mistrial in addition to striking the hearsay testimony violated his Sixth Amendment rights. The trial court sustained defendant's objection to the questionable evidence and curatively instructed the jury. In considering the effect of evidence improperly introduced, we must look at it in context. In this case, the stricken evidence would have added little to the State's case. Because the evidence was otherwise adequate to support a conviction, I would conclude that the evidence improperly introduced - a single question and answer promptly followed by an objection and a curative instruction - did not deny Goldsmith due process. *See Greer v. Miller*, 483 U.S. 756, 766 (1987).

While the case presented against Goldsmith was not an overwhelming one, it was supported by sufficient evidence and did not violate his constitutional rights. I fear that in this case the Court has been led not to a constitutional review under the Fourteenth Amendment, but to a garden variety appellate review of the same issues raised before, and properly disposed of by, the South Carolina Supreme Court. *See State v. Goldsmith*, 392 S.E.2d 787 (S.C. 1990).

Because I would affirm the district court's denial of the writ, I respectfully dissent.

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Lewis D. Goldsmith,

Petitioner-Appellant,

v.

S.R. Witkowski, Warden; State of South Carolina; Attorney General of South Carolina,

Respondents-Appellees.

No. 91-7578
CA-90-1852-6-K
Filed: January 7, 1993

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

Appellees filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

APPENDIX B

Entered at the direction of Senior Judge Sprouse, with the concurrence of Judge Murnaghan. Judge Niemeyer dissents.

For the Court,

/s/ Bert M. Montague

CLERK

92-1660

Supreme Court, U.S.
FILED
APR 6 1993
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

S. R. WITKOWSKI, WARDEN; STATE OF SOUTH CAROLINA; ATTORNEY GENERAL OF SOUTH CAROLINA,

Petitioners,

vs

LEWIS D. GOLDSMITH,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

T. Travis Medlock
Attorney General

Donald J. Zelenka
Chief Deputy
Attorney General and
Attorney of Record

Office of the Attorney General
Post Office Box 11549
Columbia, S.C. 29211

(803) 734-3713

ATTORNEYS FOR
PETITIONERS

TABLE OF CONTENTS

Page

Appendix C - Order of the Honorable Charles E. Simons, Jr., filed April 15, 1991, in Goldsmith v. Witkowski, 3:90-1852-6K C-1

Appendix D - Report of the Honorable William M. Catoe, U.S. Magistrate-Judge, filed January 18, 1991, in Goldsmith v. Witkowski, 3:90-1852-6K D-1

Appendix E - State v. Lewis Goldsmith, 301 S.C. 463, 392 S.E.2d 787 (1990) E-1

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
Civil Action No. 3:90-1852-6K

Lewis D. Goldsmith,

Petitioner,

v.

S.R. Witkowski, Warden, State of South Carolina, and the Attorney General of South Carolina,

Respondents.

ORDER

This pro se habeas corpus petition comes before the court with the Report of the United States Magistrate Judge. The Magistrate Judge identified three central questions in petitioner's arguments:

1. Whether the state trial court erred when it denied petitioner's motion for a mistrial;

2. Whether the prosecution proved every element of the offenses charged beyond a reasonable doubt; and

3. Whether the South Carolina Supreme Court erred when it found that the two lesser charges of simple possession should be vacated but did not vacate the entire conviction.

Based upon his review of the record, the Magistrate Judge concluded that the findings of the South Carolina Supreme Court were entirely correct. On that basis, he recommended that this action be dismissed.

Petitioner has filed Objections which restate his central claim that the record does not support a conclusion that he knew the substances in the dwelling where he was arrested were illegal drugs. Petitioner fails to recognize that the points he disputes were factual issues decided by the jury which heard the case. As the Magistrate Judge pointed out, the South Carolina Supreme Court found the evidence in the record to be entirely adequate to support the jury's conclusion. The Magistrate Judge agreed with the

Supreme Court's findings, and nothing in petitioner's Objections persuade this court that the Magistrate Judge's Recommendation is erroneous.

On consideration of the matter, the court hereby adopts the Magistrate Judge's Report, which is made a part of this Order by specific reference. On the basis set out therein, this Petition is hereby dismissed.

AND IT IS SO ORDERED.

s/_____
Charles E. Simons, Jr.
UNITED STATES DISTRICT JUDGE

Aiken, S.C.
April 11, 1991

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Lewis D. Goldsmith,

Petitioner,

vs

S.R. Witkowski, Warden; State of South Carolina; Attorney General of South Carolina,

Respondents.

C/A No. 3:90-1852-6K

REPORT OF MAGISTRATE

The petitioner, a state prisoner proceeding pro se, seeks habeas corpus relief pursuant to Title 28, United States Code, Section 2254.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Local Rule 19.02(b)(2)(C), D.S.C., this magistrate is authorized to review posttrial petitions

for relief and submit findings and recommendations to the District Court.

FACTS PRESENTED

The record reveals that the petitioner is currently confined in the Perry Correctional Institution pursuant to orders of commitment from the Clerk of Court for Greenville County, South Carolina. The petitioner was indicted at the October 1988 term of the Greenville County Court of General Sessions for the offenses of possession with the intent to distribute marijuana, simple possession of marijuana, possession with the intent to distribute cocaine and simple possession of cocaine. He was also indicted for two counts of conspiracy. Represented by C. Carlyle Steele, the petitioner proceeded to trial before the Honorable James E. Moore, Presiding Judge, and a jury on December 12, 1988. The State was represented by Symmes Culbertson,

Assistant Solicitor for the Thirteenth Judicial Circuit.

The record indicates that on July 22, 1988, deputies of the Greenville County Sheriff's Office executed a search warrant at #192, Oakview Village Apartments, in Taylors, South Carolina. As they approached the building, the officers saw the petitioner's codefendants, Timmy Cooper and Adele Jordan, standing in front of the building. Cooper ran into apartment #192 before the officers and attempted to prevent their entrance by slamming the apartment door on the first officer's arm.

When the first officer entered the apartment, he saw the petitioner sitting at a table. On the table were a clear plastic sandwich bag containing .1 gram of cocaine, a set of portable scales used for weighing grams, a tube straw of the type used to inhale cocaine, and a package of

rolling papers. Near a leg of the table were two clear plastic bags of marijuana. One, containing 310.92 grams, was concealed inside a larger shopping bag. The other, however, was in plain view on the floor next to the shopping bag and contained 113.4 grams. Two hundred dollars were found hidden in the petitioner's socks. The Petitioner did not reside at apartment #192.

Pursuant to their search of the apartment, the officers also seized foil-wrapped packages containing more than five grams of cocaine from the freezer, a small amount of marijuana from the bedroom, and a cup of marijuana seeds from a kitchen cabinet.

The petitioner was found guilty as charged on all counts and was subsequently sentenced by the lower court to four years for possession of marijuana, twenty years and $20,000 for possession of marijuana

with intent to distribute, four years for possession of cocaine, twenty years and $50,000 for possession of cocaine with intent to distribute, ten years for conspiracy to distribute marijuana, and ten years for conspiracy to distribute cocaine. Said sentences were to be served concurrently.

The petitioner timely filed a notice of intent to appeal said conviction and sentence. In the appeal, the petitioner was represented by Tara Shurling of the South Carolina Office of Appellate Defense. In the appeal, the following exceptions were presented:

> (1) The lower court erred, and thereby violated the Appellant's rights under the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina State Constitution by denying the Appellant's motion for a mistrial subsequent to the improper introduction of hearsay testimony from a state witness where the receipt of this information into evidence

clearly violated the Appellant's right to confront witnesses against him inasmuch as the source of the information did not testify.

(2) The lower court erred, and thereby violated the Appellant's rights to due process of law as protected by the Fourteenth Amendment to the United States Constitution as well as Article I, Section 3, of the South Carolina Constitution, by denying Appellant's motions for directed verdicts of acquittal on all charges against him where the evidence as presented by the state when viewed in the light most favorable to the prosecution was insufficient to establish the Appellant's guilt of every element of the crimes charged beyond a reasonable doubt.

(3) The lower court erred, and thereby violated the Appellant's rights to due process of law, as protected by the Fourteenth Amendment to the United States Constitution and Article I, Section 3, of the South Carolina constitution, by entering judgment against the Appellant for both simple possession of marijuana and cocaine and the greater offenses of possession with the intent to distribute marijuana and cocaine, and in subsequently sentencing the Appellant to separate terms of incarceration for each of these offenses, where the Appellant's

> double prosecution and punishment for these offenses constituted a violation of his rights against being placed in double jeopardy as protected by the Fifth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 12, of the South Carolina Constitution.

In the brief filed July 13, 1989, counsel for the petitioner raised an issue as to each exception. The respondents, through Assistant Attorney General N. Mark Rapoport, filed a brief in opposition on August 14, 1989. On June 18, 1990, the Supreme Court of South Carolina entered its opinion affirming the convictions for possession with intent to distribute and conspiracy to distribute both cocaine and marijuana, but vacated the convictions for simple possession of cocaine and marijuana as lesser included offenses. State v. Goldsmith, Op. No. 23230, filed June 18, 1990.

In his petition now before this court, the petitioner makes the following questions:

(1) Whether the lower court erred when it denied motion for mistrial.

> The State's witness intentionally made a statement that they had information that the petitioner and co-defendants would be at the apartment at the time of the raid, counsel objected, and made a motion for a mistrial and that motion was overruled by the court, petitioner contends that the curative charge did not save the prejudicial testimony from falling to a level of hearsay and becoming inadmissible testimony, and did not prejudice the petitioner to a point that it foreclosed the petitioner from receiving a fair trial.

(2) Whether or not the State proved every element of the offenses that the petitioner was charged with beyond a reasonable doubt.

> The State failed to prove that the petitioner had any knowledge of the drugs that was found at another person's home, and in

looking at the evidence in light most favorable to the State, there was not evidence that would allow the State to find the petitioner guilty beyond a reasonable doubt.

(3) Whether or not the South Carolina Supreme Court erred when it found that the two lesser charges of simple possession should be vacated and not vacate the entire matter.

(a) The petitioner contends that since the state court vacated the simple possession charges as lesser included offenses, he contends that since the court vacated half of the charges he was sentenced on that they should have vacated all the charges since there was no evidence to support the charges.

(1) The petitioner acknowledges that this issue was not presented in state court because it occurred as a result of the appeal.

On September 20, 1990, the respondents moved for summary judgment. By order of this court filed October 5, 1990, pursuant to Roseboro v. Garrsion, 528 F.2d 309 (4th Cir. 1975), the

petitioner was advised of the summary judgment procedure and the possible consequences if he failed to adequately respond to the motion. On October 10, 1990, the petitioner filed his motion for summary judgment, and motion in opposition and memorandum of law in support of motion for summary judgment.

APPLICABLE LAW

The standard for review on habeas corpus is whether after reviewing the evidence in the light most favorable to the prosecution a rational trier of fact could find essential elements of a crime beyond a reasonable doubt. Jackson v. Virginia, 43 U.S. 307 (1979).

When a state court has held a hearing, the federal habeas court must usually accord a presumption of correctness to written findings of fact by the state court in proceedings in which the petitioner was a party. 28 U.S.C.

§2254(d). In Sumner v. Mata, 449 U.S. 539 (1981), the court held that the presumption of correctness applies to determinations of both trial and appellate courts.

CONCLUSIONS AND RECOMMENDATION

The petitioner has been given a full hearing in the South Carolina Supreme Court and this court must accord a presumption of correctness to the written findings of fact of that court.

The Supreme Court found in pertinent part as follows:

> Appellant contends he was entitled to a directed verdict of acquittal on all counts because the State failed to prove his possession of any controlled substance. Possession of more than ten grains of cocaine or twenty eight grams of marijuana establishes a prima faci case of possession with intent to distribute. S.C. Code Ann. § 44-53-370(d)(3)(1985). Possession of these threshold amounts, however, is not a required element of the offense of possession with intent to distribute. Possession of any

amount of controlled substance when coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute. Matthews v. State, __ S.C. _____, 387 S.E.2d 258 (1990); State v Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). Proof of possession of drug paraphernalia is sufficient indicia of intent to distribute to support submission of such a charge to the jury where the amount of the controlled substance possessed is less than that specified in § 44-53-370(d)(3). State v. Adams, supra; see also State v. Durham, 266 S.C. 263, 222 S.E.2d 768 (1976) (evidence regarding scales in accused's possession relevant on issue of intent to distribute).

Further, possession may be inferred from the circumstances and is imputed to one who has the power and intent to control the disposition or use of contraband. State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987); State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974). Actual knowledge of the presence of contraband is strong evidence of intent to control its disposition or use. State v. Kimbrell, supra; State v. Lane, 271 S.C. 68, 245 S.E.2d 114 (1978).

Viewing the evidence in the light most favorable to the

State, it may be reasonably inferred appellant had actual knowledge of the .1 gram of cocaine in plain view on the table and the 113.4 grams of marijuana in plain view on the floor in his immediate vicinity. Possession of this contraband, including the paraphernalia also in plain view, is therefore imputed to appellant. State v. Kimbrell, supra. This evidence supports the submission of possession with intent to distribute marijuana and possession with intent to distribute cocaine to the jury [FN-The .1 gram of cocaine at issue is less than the 10 grain amount specified in §44-53-370(d)(3).]. Matthews v. State, supra; State v. Adams, supra. Submission of the conspiracy charges was proper based on the evidence appellant was alone in another's residence with controlled substances and paraphernalia in his constructive possession when Cooper attempted to prevent the officers from entering the apartment. See State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980) (conspiracy may be shown by circumstantial evidence including the parties' conduct). We conclude the trial judge properly denied the motion for directed verdict on all counts.

Appellant further contends the trial judge should have granted his motion for a mistrial. On direct examination of Officer

Rogers, the solicitor asked why the Sheriff's Office chose this particular day to execute the search warrant. Officer Rogers answered: "We had information [appellant] and Mr. Cooper would both be present at the time." The trial judge sustained defense counsels objection and instructed the jury to disregard the answer. Counsel then moved for a mistrial.

An instruction to disregard incompetent evidence is usually deemed to have cured any prejudice in its admission. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). Although it was improper for the solicitor to pose such a question, the resulting prejudice was not of such a magnitude as to effect [sic] the outcome of the trial in light of the competent evidence discussed above. See State v. Dawkins, supra.

We affirm appellant's convictions for possession with intent to distribute and conspiracy to distribute both cocaine and marijuana; the convictions for simple possession of cocaine and marijuana are vacated as lesser included offenses. Matthews v. State, supra.

Having reviewed the trial transcript. this court concurs with the findings of the South Carolina Supreme Court.

As to the petitioner's third allegation that he was entitled to have his remaining charges vacated, this court finds no merit in such an argument and concurs with the decision of the South Carolina Supreme Court to vacate the offenses of simple possession of cocaine and marijuana as lesser included offenses.

Wherefore, it is recommended that this action be dismissed.

William M. Catoe, Jr.
United States Magistrate

January 17, 1991
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

vs

Lewis D. Goldsmith,

Appellant.

Appeal from Greenville County
James E. Moore, Judge

Opinion No. 23230
Heard April 3, 1990 - Filed June 18, 1990

AFFIRMED IN PART; VACATED IN PART

GREGORY, C.J.: Appellant was convicted of possession with intent to distribute, conspiracy to distribute, and simple possession of both marijuana and cocaine. He was sentenced to concurrent terms and/or fines on all counts. We affirm in part and vacate in part.

The record indicates on July 22,

1988, deputies of the Greenville County Sheriff's Office executed a search warrant at Oakview Village Apartments #192 in Taylors, South Carolina. The officers saw appellant's codefendants, Timmy Cooper and Adele Jordan, standing in front of he building as they approached. Cooper ran into apartment #192 before the officers and attempted to prevent their entrance by slamming the apartment door on the first officer's arm.

When the first officer entered the apartment, he saw appellant sitting at a table. A clear plastic sandwich bag containing .1 gram of cocaine, a set of portable scales used for weighing grams, a tube straw of the type used to inhale cocaine, and package of rolling papers were on the table. Near a leg of the table were two clear plastic bags of marijuana. One, containing 310.92 grams, was concealed inside a larger shopping

bag; the other, however, was in plain view on the floor next to the shopping bag and contained 113.4 grams. Two hundred dollars were found hidden in appellant's sock. Appellant did not reside at apartment #192.

Pursuant to their search of the apartment, the officers also seized foil-wrapped packages containing more than five grams of cocaine found in the freezer, a small amount of marijuana from the bedroom, and a cup of marijuana seeds from a kitchen cabinet.

Appellant contends he was entitled to a directed verdict of acquittal on all counts because the State failed to prove his possession of any controlled substance. Possession of more than ten grains of cocaine or twenty-eight grams of marijuana establishes a prima facie case of possession with intent to distribute. S.C. Code Ann. § 44-53-370(d)(3)(1985).

Possession of these threshold amounts, however, is not a required element of the offense of possession with intent to distribute. Possession of any amount of controlled substance when coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute. Matthews v. State, ____ S.C. ____, 387 S.E.2d 258 (1990); State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). Proof of possession of drug paraphernalia is sufficient indicia of intent to distribute to support submission of such a charge to the jury where the amount of the controlled substance possessed is less than that specified in § 44-53-270(d)(3). State v. Adams, supra; see also State v. Durham, 266 S.C. 263, 222 S.E.2d 768 (1976) (evidence regarding scales in accused's possession relevant on issue of intent to distribute).

Further, possession may be inferred from the circumstances and is imputed to one who has the power and intent to control the disposition or use of contraband. State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987); State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974). Actual knowledge of the presence of contraband is strong evidence of intent to control its disposition or use. State v. Kimbrell, supra; State v. Lane, 271 S.C. 68, 245 S.E.2d 114 (1978).

Viewing the evidence in the light most favorable to the State, it may be reasonably inferred appellant had actual knowledge of the .1 gram of cocaine in plain view on the table and the 113.4 grams of marijuana in plain view on the floor in his immediate vicinity. Possession of this contraband, including the paraphernalia also in plain view, is therefore imputed to appellant. State v.

Kimbrell, supra. This evidence supports the submission of possession with intent to distribute marijuana and possession with intent to distribute cocaine to the jury.[1] Matthews v. State, supra; State v. Adams, supra. Submission of the conspiracy charges was proper based on the evidence appellant was along in another's residence with controlled substances and paraphernalia in his constructive possession when Cooper attempted to prevent the officers from entering the apartment. See State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980) (conspiracy may be shown by circumstantial evidence including the parties' conduct). We conclude the trial judge properly denied the motion for directed verdict on all counts.

Appellant further contends the trial judge should have granted his motion for a

---

[1]The .1 gram of cocaine at issue is less than the 10 grain amount specified in § 44-53-370(d)(3).

mistrial. On direct examination of Officer Rogers, the solicitor asked why the Sheriff's Office chose this particular day to execute the search warrant. Officer Rogers answered: "We had information [appellant] and Mr. Cooper would both be present at the time." The trial judge sustained defense counsel's objection and instructed the jury to disregard to the answer. Counsel then moved for a mistrial.

An instruction to disregard incompetent evidence is usually deemed to have cured any prejudice in its admission. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). Although it was improper for the solicitor to pose such a question, the resulting prejudice was not of such a magnitude as to effect the outcome of the trial in light of the

competent evidence discussed above. See State v. Dawkins, supra.

We affirm appellant's convictions for possession with intent to distribute and conspiracy to distribute both cocaine and marijuana; the convictions for simple possession of cocaine and marijuana are vacated as lesser included offenses. Matthews v. State, supra.

AFFIRMED IN PART; VACATED IN PART.

HARWELL, CHANDLER, FINNEY AND TOAL, JJ., concur.

ORIGINAL

Supreme Court, U.S.
FILED
JUN 1 1993
OFFICE OF THE CLERK

No. 92-1668

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

S. R. WITKOWSKI, WARDEN, et al.,
Petitioners,

v.

LEWIS D. GOLDSMITH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Steven H. Goldblatt
Counsel of Record

Appellate Litigation Clinical
Program
Georgetown University Law
Center
111 F Street, N.W.
Suite 123
Washington, D.C. 20001-2095
(202) 662-9555

27 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals, viewing the state court trial record in the light most favorable to the petitioners and treating applicable South Carolina law as controlling its inquiry, erred when it granted the writ of habeas corpus upon finding that no rationale juror could have found the essential elements of the crimes charged against respondent beyond a reasonable doubt?

2. Did the court of appeals err when it granted the writ because the prosecutor elicited highly improper testimony that no juror could conceivably ignore despite the fact that the evidence was stricken and the jury was instructed to disregard it?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

REASONS WHY THE PETITION SHOULD BE DENIED

1. Introduction 1

2. The constitutional sufficiency of the evidence was determined under appropriate standards 2

   a. Possession with intent to distribute 3

   b. Conspiracy to distribute 7

3. The Case Specific Determination does not warrant review in this Court 11

4. There is no reason to reconsider the standard of review for evidentiary sufficiency claims 12

5. The alternative holding below, that the introduction of highly prejudicial and inadmissible testimony at the state trial compelled federal habeas relief, is not an issue worthy of plenary review in this Court . . . 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Brecht v. Abrahamson, 123 L. Ed. 2d 353 (1993) 17, 18

Chapman v. California, 386 U.S. 18 (1967) 17, 18, 19

City of Cincinnati v. McCartney, 281 N.E.2d 855 (Ohio Ct. App. 1971) 7

Delta Airlines v. August, 450 U.S. 346 (1981) 12

Enamorado v. State, 534 N.E.2d 740 (Ind. 1989) 7

Goldsmith v. Witkowski, 981 F.2d 697 (4th Cir. 1992) 12

Greer v. Miller, 483 U.S. 756 (1987) . . . . . passim

Harris v. Blackburn, 646 F.2d 904 (5th Cir. 1981) 5

Jackson v. Virginia, 443 U.S. 307 (1979) . . . . . passim

Kotteakos v. United States, 328 U.S. 750 (1946) 17, 18

Menefee v. State, 592 So. 2d 642 (Ala. Crim. App. 1991) 6

Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974) 11

Paez v. O'Lone, 772 F.2d 1158 (3d Cir. 1985) 5

People v. Webb, 578 N.Y.S.2d 579 (N.Y. App. Div. 1992) 7

Skelton v. State, 609 So. 2d 716 (Fla. Dist. Ct. App. 1992) 6

State v. Barber, 635 S.W.2d 342 (Mo. 1982) 7

State v. Bell, 566 So. 2d 959 (La. 1990) 7

State v. Bradford, 808 P.2d 174 (Wash. Ct. App.), review denied, 815 P.2d 266 (Wash. 1991) 7

State v. Brown, 227 S.E.2d 674 (S.C. 1976) 3

State v. Ellis, 207 S.E.2d 408 (S.C. 1974) 3, 4

State v. Good, 417 S.E.2d 640 (S.C. Ct. App. 1992), S.C. cert. granted (12/8/92) 8

State v. Hudson, 284 S.E.2d 773 (S.C. 1981) 3

State v. Kimbrell, 362 S.E.2d 630 (S.C. 1987) 3

State v. Oliver, 267 S.E.2d 529 (S.C. 1980) 7

State v. Robinson, 412 S.E.2d 411 (S.C. 1991) 8

State v. Sullivan, 282 S.E.2d 838 (S.C. 1981) 8

State v. Tabory, 196 S.E.2d 111 (S.C. 1973) 3

Teague v. Lane, 489 U.S. 288 (1989) 2, 13

United States v. Batimana, 623 F.2d 1366 (9th Cir.), cert. denied, 449 U.S. 1038 (1980) 6

United States v. Butler, 792 F.2d 1528 (11th Cir.), cert. denied sub. nom, Waites v. United States, 479 U.S. 933 (1986) 11

United States v. Coyote, 963 F.2d 1328 (10th Cir. 1992) 11

United States v. Durrive, 902 F.2d 1221 (7th Cir. 1990) 10

United States v. Evans, 970 F.2d 663 (10th Cir. 1992), cert. denied, 113 S. Ct. 1288 (1993) 9

United States v. Fox, 902 F.2d 1508 (10th Cir.), cert. denied, 498 U.S. 874 (1990) 9

United States v. Garcia, 983 F.2d 1160 (1st Cir. 1993) 5

United States v. Gardiner, 955 F.2d 1492 (11th Cir. 1992) 6

United States v. Hernandez, 876 F.2d 774 (9th Cir.), cert. denied, 493 U.S. 863 (1989) 6

United States v. Hernandez, 986 F.2d 234 (8th Cir. 1993) 10

United States v. Hyson, 721 F.2d 856 (1st Cir. 1983) 10

United States v. Johnston, 268 U.S. 220 (1925) 11

United States v. Leon, 739 F.2d 885 (3d Cir. 1984) 10

United States v. Meyers, 646 F.2d 1142 (6th Cir. 1981) 9

United States v. Mieres-Borges, 919 F.2d 652 (11th Cir. 1990), cert. denied, 111 S. Ct. 1633 (1991) 6

United States v. Morris, 836 F.2d 1371 (D.C. Cir. 1988) 9

United States v. Ocampo, 964 F.2d 80 (1st Cir. 1992) 10

United States v. Pardo, 636 F.2d 535 (D.C. Cir. 1980) 5

United States v. Pearce, 912 F.2d 159 (6th Cir. 1990), cert. denied sub. nom, Thorpe v. United States, 111 S. Ct. 978 (1991) 10

United States v. Requarth, 847 F.2d 1249 (7th Cir. 1988) 5

United States v. Restrepo, 930 F.2d 705 (9th Cir. 1991) 10

United States v. Revel, 971 F.2d 656 (11th Cir. 1992), cert. denied sub. nom, Pullam v. United States, 113 S. Ct. 1665 (1993) 9

United States v. Rios, 856 F.2d 493 (2d Cir. 1988) 5

United States v. Rogers, 921 F.2d 1089 (10th Cir. 1990), cert. denied, 111 S. Ct. 2812 (1991) 6

United States v. Sanchez, 961 F.2d 1169 (5th Cir.), cert. denied, 113 S. Ct. 330 (1992) 10

United States v. Soto, 716 F.2d 989 (2d Cir. 1983) 10

United States v. Townsend, 924 F.2d 1385 (7th Cir. 1991) 9

United States v. Turner, 975 F.2d 490 (8th Cir. 1992), cert. denied sub. nom, Dowdy v. United States, 113 S. Ct. 1053 (1993) 9

United States v. Wajda, 810 F.2d 754 (8th Cir.), cert. denied, 481 U.S. 1040 (1987) 6

Whipple v. State, 427 S.E.2d 101 (Ga. Ct. App. 1993) 6

In re Winship, 397 U.S. 358 (1970) 14

Wright v. West, 112 S. Ct. 2482 (1992) . . . . . passim

Youakim v. Miller, 425 U.S. 231 (1976) 13

STATUTES AND RULES

S.C. Code Ann. § 16-17-410 (Law. Co-op. 1985) 7

Sup. Ct. R. 10 1

Sup. Ct. R. 10.1.(a) 15

REASONS FOR DENYING THE PETITION

1. Introduction.

The decision below presents no significant issue that would justify plenary review by this Court. Rather, the court below applied established precedent to the facts of this case when it (1) applied this Court's decisions in Jackson v. Virginia, 443 U.S. 307 (1979), and Wright v. West, 112 S. Ct. 2482 (1992), to evaluate Goldsmith's challenge to the sufficiency of the evidence supporting his South Carolina convictions and (2) applied this Court's decision in Greer v. Miller, 483 U.S. 756 (1987), to assess whether a curative instruction, directing the jury to disregard stricken testimony, was adequate to protect Goldsmith's right to a fundamentally fair trial. The determinations that the evidence was insufficient and that Goldsmith was also denied fundamental fairness do not warrant review by this Court. There is no conflict cited here with other circuit decisions and the claim that the ruling below is inconsistent with prior decisions of this Court, See Sup. Ct. R. 10, is insupportable.[1]

Petitioners themselves acknowledge that they are asking this Court to examine the particular facts of this case and that "this Court does not generally grant certiorari to review evidence and

---

[1] The dissent below perceived no conflict with the decisions of this Court or any other jurisprudential issues. The focus of the dissent centered squarely on the evaluation of the peculiar facts of this case and whether the court below "failed to take the evidence in a light most favorable to the State . . . ." Pet. App. 30.

discuss specific facts." Pet. 15. The Court should not do so here.

It also bears mention that there is no conflict created between South Carolina decisions and the decision below except for the disagreement, specific to this case, whether these peculiar facts establish constitutional violations. In particular, petitioners' claim that the substantive law of South Carolina of constructive possession has been "rewrit[ten]," Pet. 29, is sheer hyperbole. The decision below has no effect, beyond this one case, on South Carolina law. Tellingly, petitioner and the court below have never even hinted that the ruling in this case announced anything that would require consideration of the Teague v. Lane, 489 U.S. 288 (1989) bar on announcing new rules in habeas cases and petitioner makes no Teague claim here.

2. **The constitutional sufficiency of the evidence was determined under appropriate standards.**

The court below properly applied the test enunciated in Jackson v. Virginia and reiterated in Wright v. West in reviewing Goldsmith's constitutional claim of evidentiary insufficiency. The court considered whether "*any* possible rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Pet. App. 8 (quoting Jackson, 443 U.S. at 319). It faithfully followed Jackson's dictate to review the evidence "with explicit reference to the substantive elements of the criminal offense as defined by state law," Jackson, 443 U.S. at 324 n.16, and to assess the evidence "in the light most

favorable to the prosecution," id. at 319. See Pet. App. 8-9, 16-17. The court below concluded that no rational juror could have found that Goldsmith had constructive possession or participated in a conspiracy based upon his mere presence in an apartment and his knowledge of drugs and drug paraphernalia. Pet. App. 14-16, 17-18. The ruling is case specific and of no peculiar significance to other cases.

a. Possession with intent to distribute

The court below followed Jackson and first looked to South Carolina law to determine the elements of the offense. Pet. App. 8-13. Under South Carolina law, "[c]onviction of possession of [drugs] requires proof of possession--either actual or constructive, coupled with knowledge of its presence." State v. Hudson, 284 S.E.2d 773, 774-75 (S.C. 1981); State v. Brown, 227 S.E.2d 674, 676 (S.C. 1976). To prove constructive possession, the State must prove more than "mere presence[.] . . . [T]he State must show defendant had dominion and control over the thing allegedly possessed or had the right to exercise dominion and control over it." State v. Tabory, 196 S.E.2d 111, 113 (S.C. 1973).[2] The court below adhered to this definition when it

---

[2] See also State v. Kimbrell, 362 S.E.2d 630, 632 (S.C. 1987) ("[M]ere presence, where the drugs are present, would not be sufficient to convict, without more.") (internal quotations omitted); State v. Brown, 227 S.E.2d 674, 677 (S.C. 1976) (reversing conviction where evidence of defendant's presence in car containing eight pounds of marijuana "fail[ed] to make a jury issue of [his] dominion and control of the marijuana"); State v. Ellis, 207 S.E.2d 408, 413 (S.C. 1974) (reversing conviction where, despite fact that defendant resided in apartment in which heroin sales were made and may have been present at the time of

(continued...)

stated, "A person has constructive possession of drugs if he has knowledge of the drugs *and* dominion and control, or the right to exercise dominion and control, over the drugs."[3] Pet. App. 8-9 (citing State v. Ellis, 207 S.E.2d 408, 413 (1974)).

The court below assessed the evidence under applicable South Carolina standards. The court below found that the State

> presented only an evidentiary picture of an accused sitting at a table laden with narcotics and narcotic paraphernalia in an apartment where other drugs and paraphernalia were later discovered. . . . At best, the State's evidence showed Goldsmith's presence in an unknown person's apartment and his knowledge of drugs and drug paraphernalia in the apartment.

Pet. App. 13-14. The court correctly recognized that while a jury could properly infer knowledge from such circumstances, there was virtually no evidence from which a jury could infer dominion or control. Pet. App. 9-10.

Because the State failed to prove dominion and control, the court below ruled that the prosecution had failed to prove a necessary element of the offense and, thus, had presented insufficient evidence to rationally convict Goldsmith for possession. Pet. App. 15. In doing so, the court below was following this Court's established precedent that "a conviction based upon a record wholly devoid of any relevant evidence of a

---

[2](...continued)
those sales, there was no evidence that defendant had dominion and control over the drugs).

[3] Nor was the appropriateness of using this legal standard disputed by the dissent. See Pet. App. 29-30.

crucial element of the offense charged is constitutionally infirm." Jackson, 443 U.S. at 314.

There is no merit to Petitioners' claim that the panel has "rewrit[ten]" the substantive law of constructive possession in South Carolina. Pet. 29. This decision is faithful to and fully respects South Carolina substantive law. Indeed, the proposition that presence and knowledge of drugs is not alone necessarily adequate to convict as a matter of law is virtually universally recognized in habeas and other contexts.[4]

---

[4] Other courts have often been called on to determine whether presence at a drug scene establishes guilt or mere presence. In each instance, as here, the outcome is based on the specific facts presented. E.g., United States v. Pardo, 636 F.2d 535, 549 (D.C. Cir. 1980) ("One principle of law firmly rooted in this circuit is that *mere presence at the scene of a drug transaction or mere proximity to drugs seized is not sufficient to establish guilt*. . . . [T]here must be something more than mere presence at the scene of a criminal transaction. There must be some action, some word, or some conduct that links the individual to the narcotics and indicates that he had some stake in them, some power over them. There must be something to prove that the individual was not merely an incidental bystander."); United States v. Garcia, 983 F.2d 1160, 1164 (1st Cir. 1993) ("Mere presence or association with another who possessed the contraband is .. insufficient to establish constructive possession."); United States v. Rios, 856 F.2d 493, 496 (2d Cir. 1988) ("It is true that mere presence at the location of contraband does not establish possession. . . . What is required is sufficient indicia of dominion and control."); Paez v. O'Lone, 772 F.2d 1158, 1159 (3d Cir. 1985) ("As a general proposition, it is improper to infer possession from the mere presence of the defendant at the location where the narcotics are found."); Harris v. Blackburn, 646 F.2d 904, 906 (5th Cir. 1981) (reversing district court's denial of habeas writ and holding that "while it can be inferred from [defendant's] presence in the car and from the location of the heroin in 'plain view' in the console that [defendant] had knowledge of the presence of drugs, it is clear that knowledge of the presence of drugs is insufficient to prove 'dominion' or 'control' over the drugs, and, therefore, is insufficient to establish 'possession'"); United States v. Requarth, 847 F.2d 1249, 1252 n.3 (7th Cir. 1988) (referencing (continued...)

[4](...continued)
jury instruction which directed "Mere presence in the vicinity of the controlled substance or mere knowledge of its physical location, standing alone, . . . does not constitute possession"); United States v. Wajda, 810 F.2d 754, 761 (8th Cir.) ("Factors including occupancy of the premises where the drugs are found, proximity to where the drugs are found, or association with the person or persons in possession of the drugs may raise the inference of constructive possession, but are insufficient of themselves to support a conviction. . . . In order for the evidence to be sufficient to sustain a conviction for possession, there must be some nexus linking the defendant to the drugs.") (citations omitted), cert. denied, 481 U.S. 1040 (1987); United States v. Hernandez, 876 F.2d 774, 778 (9th Cir.) ("Mere proximity to contraband, presence on property where it is found and association with a person or persons having control of it are all insufficient to establish constructive possession.") (internal quotation marks omitted), cert. denied, 493 U.S. 863 (1989); United States v. Batimana, 623 F.2d 1366, 1369 (9th Cir.) ("Mere proximity to the drug, mere presence, or mere association with the person who does control the drug is insufficient to support a finding of possession.") (citations omitted), cert. denied, 449 U.S. 1038 (1980); United States v. Rogers, 921 F.2d 1089, 1093 (10th Cir. 1990) ("[M]ere proximity to illegal drugs, mere presence on the property where they are located or mere association with persons who do control them, without more, is insufficient to support a finding of possession.") (internal quotation marks omitted), cert. denied, 111 S. Ct. 2812 (1991); United States v. Gardiner, 955 F.2d 1492, 1495 (11th Cir. 1992) ("[M]ere presence in the area of contraband or awareness of its location is not sufficient to establish possession.") (internal quotation marks omitted); United States v. Mieres-Borges, 919 F.2d 652, 659 (11th Cir. 1990) (holding that proximity of defendant to bales of cocaine was "insufficient as a matter of law to allow a finding of guilt beyond a reasonable doubt" for possession), cert. denied, 111 S. Ct. 1633 (1991).

State courts routinely hold that mere presence is insufficient to convict for possession. E.g., Menefee v. State, 592 So. 2d 642, 644 (Ala. Crim. App. 1991) ("[M]ere presence of the accused in a place where a controlled substance is found is not in and of itself evidence of possession.") (internal quotation marks omitted); Whipple v. State, 427 S.E.2d 101, 102 (Ga. Ct. App. 1993) ("A finding of constructive possession must be based upon some connection between the defendant and the contraband other than spatial proximity. Evidence of mere presence at the scene of the crime, and nothing more to show participation of a defendant in the illegal act, is insufficient to support a conviction.") (internal quotation marks omitted); Skelton v. State, 609 So. 2d 716, 717 (Fla. Dist. Ct. App. 1992)
(continued...)

b. Conspiracy to distribute

Reviewing the evidence presented by the prosecution to support Goldsmith's conspiracy convictions, the court below again remained faithful to the Jackson analysis. South Carolina law defines a conspiracy as "a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object or an object neither criminal nor unlawful by criminal or unlawful means." S.C. Code Ann. § 16-17-410 (Law. Co-op. 1985). The State must first prove the existence of a conspiracy either by "a formal express agreement" between the conspirators or "circumstantial evidence and the conduct of the parties." State v. Oliver, 267 S.E.2d 529, 530 (S.C. 1980).

---

[4](...continued)
("Mere proximity to contraband is insufficient to establish constructive possession."); Enamorado v. State, 534 N.E.2d 740, 742 (Ind. 1989) ("[M]ere presence or association with another who actually possessed contraband is insufficient to show constructive possession."); State v. Bell, 566 So. 2d 959, 959 (La. 1990) ("It is settled . . . that '[t]he mere presence of someone in the area where the controlled dangerous substance is found . . . is insufficient to constitute constructive possession.'"); State v. Barber, 635 S.W.2d 342, 344 (Mo. 1982) (reversing conviction where evidence "established only that the defendant was discovered in a room with large quantities of controlled substances"); People v. Webb, 578 N.Y.S.2d 579, 580 (N.Y. App. Div. 1992) ("While . . . the defendant was found in the room where the marihuana was discovered, his mere presence was insufficient to establish that he exercised dominion and control over the marihuana, which is necessary to establish constructive possession . . . ."); City of Cincinnati v. McCartney, 281 N.E.2d 855, 856 (Ohio Ct. App. 1971) (holding that evidence of defendants "seated on chairs about six feet from the [marijuana] plants when the arresting officer entered the apartment in question" was insufficient to prove constructive possession of such plants); State v. Bradford, 808 P.2d 174, 177 (Wash. Ct. App.) ("[M]ere proximity is insufficient to show dominion and control. . . . [K]nowledge of the presence of the drug, without more, [is] also insufficient."), review denied, 815 P.2d 266 (Wash. 1991).

After the existence of a conspiracy is proven, a defendant's connection to the conspiracy, however slight, is required to convict the defendant of knowing participation in the conspiracy. State v. Sullivan, 282 S.E.2d 838, 843 (S.C. 1981). To prove participation, the State must present proof beyond mere presence or mere knowledge to show a defendant's membership in a conspiracy. See State v. Robinson, 412 S.E.2d 411, 413 (S.C. 1991) (reversing conviction where trial judge erroneously instructed the jury that mere presence or association with people who possess drugs is sufficient proof that defendant was a member of a conspiracy); Sullivan, 282 S.E.2d at 843 (reversing conviction for conspiracy where evidence proved "[m]ere association"); State v. Good, 417 S.E.2d 640, 643 (S.C. Ct. App. 1992) (upholding jury instruction for conspiracy and other offenses which directed, "Mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish guilt unless [the jury] find[s] beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator."), [South Carolina] cert. granted (Dec. 8. 1992).

Applying the standard as defined by state law, Pet. App. 16-17, the court found that the State had presented no evidence to show the existence of a conspiracy, and even assuming that it

had, there was no evidence to show Goldsmith's participation.[5]

Pet. App. 17. The court reasoned,

> A reasonable juror could have believed Goldsmith was a user waiting to make a purchase, a friend of the owner or lessee of the apartment, or perhaps even an interloper. A conclusion, however, that Goldsmith was part of a conspiracy to distribute marijuana or cocaine, requires bridging an evidentiary gap with rank speculation.[6]

---

[5] Petitioners make much out of the conduct of Goldsmith's codefendant, Cooper, who attempted to obstruct the police from entering the apartment pursuant to a valid search warrant. Pet. 25. Such conduct, while relevant to showing Cooper's guilt, is not rationally relevant to implicate Goldsmith in a conspiracy. See United States v. Evans, 970 F.2d 663, 674 (10th Cir. 1992) ("The best way to assess a defendant's intended involvement in a conspiracy is to examine the conspiracy from that defendant's point of view."), cert. denied, 113 S. Ct. 1288 (1993).

[6] Petitioners seize on the court's language that given the fact that Goldsmith was in an apartment with drugs, a reasonable juror could just as easily believed that he was a user waiting to make a purchase. Pet. App. 17. Petitioners' bald contention that this hypothesis is sufficient to rationally prove Goldsmith's participation in a conspiracy to distribute drugs is erroneous as a matter of law. Pet. 24. E.g., United States v. Morris, 836 F.2d 1371, 1374 (D.C. Cir. 1988) ("Governing law seems perfectly clear . . . that a buyer-seller relationship does not make out a conspiracy even if the item sold is one to be used illegally."); United States v. Meyers, 646 F.2d 1142, 1145 (6th Cir. 1981) (holding that proof of buyer-seller relationship, standing alone, was insufficient evidence to prove a conspiracy); United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir. 1991) ("[E]vidence of a buyer-seller relationship, standing alone, is insufficient to support a conspiracy conviction."); United States v. Turner, 975 F.2d 490, 497 (8th Cir. 1992) ("[M]ere existence of a buyer-seller relationship is insufficient to prove a conspiracy."), cert. denied sub. nom Dowdy v. United States, 113 S. Ct. 1053 (1993); United States v. Fox, 902 F.2d 1508, 1514 (10th Cir.) ("[P]roof of the existence of a buyer-seller relationship, without more, is inadequate to tie the buyer to a larger conspiracy.") (internal quotation marks omitted), cert. denied, 498 U.S. 874 (1990); United States v. Revel, 971 F.2d 656, 660 (11th Cir. 1992) ("[M]ere buyer/seller relationship is inadequate to link individuals to a conspiracy . . . ."), cert. denied sub. nom Pullam v. United States, 113 S. Ct. 1665 (1993), and cert. denied, 113 S. Ct. 1828 (1993).

Pet. App. 17-18. Therefore, the court concluded that Goldsmith's presence and knowledge of the drugs, standing alone, was constitutionally insufficient to convict him for conspiracy. Pet. App. 17. This decision is compelled given the elements of the crime of conspiracy in South Carolina law and is also jurisprudentially consistent with other authority across the country.[7]

---

[7] E.g., United States v. Ocampo, 964 F.2d 80, 82 (1st Cir. 1992) (holding that "mere awareness" of criminal activity was insufficient evidence to prove membership in a conspiracy); United States v. Hyson, 721 F.2d 856, 862 (1st Cir. 1983) (holding that evidence of defendant's occupancy of the apartment with knowledge that hashish was being stored there was insufficient to sustain conviction for conspiracy); United States v. Soto, 716 F.2d 989, 991-92 (2d Cir. 1983) ("[Defendant's] mere presence at the apartment, even coupled with the knowledge that a crime was being committed there, is not sufficient to establish her guilt. Evidence tending to show knowing participation in the conspiracy is also needed. . . . [P]articipation in the conspiracies cannot be proven by presence alone.") (citations omitted); United States v. Leon, 739 F.2d 885, 892-93 (3d Cir. 1984) (noting that "presence alone" or "proximity alone" is insufficient to establish participation in a conspiracy); United States v. Sanchez, 961 F.2d 1169, 1180 (5th Cir.) (holding that evidence of defendant's knowledge of a conspiracy was insufficient where there was no evidence showing beyond a reasonable doubt that defendant participated in the conspiracy), cert. denied, 113 S. Ct. 330 (1992); United States v. Pearce, 912 F.2d 159, 162 (6th Cir. 1990) (holding that "mere presence" of defendants in house at time of police raid was insufficient evidence to support conspiracy convictions), cert. denied sub. nom Thorpe v. United States, 111 S. Ct. 978 (1991); United States v. Durrive, 902 F.2d 1221, 1225 (7th Cir. 1990) ("A defendant's mere knowledge of, approval of, association with, or presence at a conspiracy is insufficient to establish the participation element."); United States v. Hernandez, 986 F.2d 234, 236 (8th Cir. 1993) ("Mere presence at the location of the crime alone, even when coupled with knowledge of that crime, is not sufficient to establish guilt on a conspiracy charge."); United States v. Restrepo, 930 F.2d 705, 709 (9th Cir. 1991) ("It is clear that mere association with members of a conspiracy, or simple knowledge, approval, or acquiescence in the object or purpose of the conspiracy, without intention and agreement to accomplish a

(continued...)

Thus, there is no conflict with this Court's or any other courts' statements of the controlling law that could support a grant of certiorari here. Cf. Mobil Oil Corp. v. FPC, 417 U.S. 283, 292 (1974) (granting certiorari to determine whether the appellate court "misapprehended or grossly misapplied" the legal standard).

3. **The Case Specific Determination does not warrant review in this Court.**

Essentially, Petitioners are asking this Court to do little more than redetermine whether no rational jury could convict based on the evidence presented here. This exercise is not worthy of the Court's time. United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Here, there is no legal principle at stake, only a disagreement whether the particular facts of this case are constitutionally adequate to prove guilt. This Court has no reason to revisit the factual record to make its own

---

[7](...continued)
specific illegal objective, is not sufficient to make one a conspirator.") (internal quotation marks omitted); United States v. Coyote, 963 F.2d 1328, 1331 (10th Cir. 1992) ("Proof of knowledge of illegal activity or mere presence at the crime scene, standing alone, are not sufficient to establish a conspiracy beyond a reasonable doubt."); United States v. Butler, 792 F.2d 1528, 1536 (11th Cir.) ("[M]ere knowledge of the conspiracy in association with the conspirators is insufficient evidence to support a conspiracy conviction.") (internal quotation marks omitted), cert. denied sub. nom Waites v. United States, 479 U.S. 933 (1986).

determination of whether the evidence establishing presence was also adequate to establish dominion and control.

4. **There is no reason to reconsider the standard of review for evidentiary sufficiency claims.**

Alternatively, Petitioners suggest that this Court essentially overrule Jackson and much of the Court's habeas jurisprudence and require deferential review of state court decisions applying law to facts. Pet. 29-30. This case is a particularly inappropriate one to undertake this type of review. In the proceedings below, Petitioners embraced the Jackson standard with no hint that any other approach be considered. Petitioners, in fact, conceded that "[t]he substantive law of South Carolina presents the *threshold parameters* for sufficiency of the evidence inquiry." Brief of Appellees at 8, Goldsmith v. Witkowski, 981 F.2d 697 (4th Cir. 1992) (No. 91-7578) (emphasis added). This circuit court brief was submitted *after* this Court posed the question for briefing in Wright v. West.[8] Because Petitioners have never challenged the applicability of the Jackson standard of review, and the courts below never addressed it, such a request is inappropriate here. See Delta Airlines v. August, 450 U.S. 346, 362 (1981) (ruling that question presented

---

[8] On December 18, 1991, this Court requested additional briefing on the question of whether a federal habeas court should review the state court's application of law to facts de novo or whether it should give deference to the state court's determination. Wright v. West, 112 S. Ct. 672 (1991). Petitioners' brief was filed in the court below on April 20, 1992.

in petition for certiorari but not raised in the court of appeals was not properly before the Court); Youakim v. Miller, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

Indeed, a comparison with Wright is indicative of why this case is neither worthy of review nor appropriate for reconsidering the standard of review. In Wright, at issue was a common law inference, recognized in Virginia as well as many other jurisdictions, that the unexplained possession of recently stolen goods necessarily is sufficient evidence as a matter of law to prove that the possessor committed larceny. Wright, 112 S. Ct. at 2485. The Fourth Circuit rejected this deeply rooted common law proposition when it granted habeas relief and held that the defendant's possession of stolen goods was legally insufficient to prove larceny in that case. Id. at 2486. Thus, the Wright circuit court decision had significant precedental impact on state law beyond the case being decided. Indeed, unlike this case, a major issue in the circuit and here in Wright was whether the circuit ruling violating the Teague v. Lane, 489 U.S. 288 (1989) proscription against pronouncing new rules on habeas review. No Teague issue has ever been raised in this case simply because it does not state a new rule of law.

Unlike Wright, the decision below has no implications for other cases. The decision below was rendered with reference to the specific facts of the case. Moreover, it is noteworthy that in contrast to Wright, in which twenty-five states joined as

amici in support of the petitioner at the certiorari stage,[9] *no* states have joined Petitioners at this stage of the proceedings. Petitioners' claim that the decision below will undermine state drug prosecutions, Pet. 14-15, must be evaluated in this context.

Finally, this case is an inappropriate vehicle to review broader standard of review principles. Unlike other forms of de novo review that require habeas courts to apply legal standards to differing factual situations, Jackson already has substantial deference built into its review standard. The Jackson standard

> gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. . . . [and] impinges upon 'jury' discretion *only to the extent necessary to guarantee the fundamental protection of due process of law.*

Jackson, 443 U.S. at 319 (emphasis added). Heightened deference to decisions made under the already deferential Jackson standard would be either redundant or would fundamentally alter the substantive guarantee promised by In re Winship, 397 U.S. 358 (1970), that no person shall stand convicted except on proof beyond a reasonable doubt.

---

[9] *Amici* included the Attorneys General of Alabama, Alaska, Arizona, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Utah, Vermont, and West Virginia. Brief of Amicus Curiae in Support of Petitioner at A-2 - A-3, Wright v. West, 112 S. Ct. 2482 (1992) (No. 91-542).

5. **The alternative holding below, that the introduction of highly prejudicial and inadmissible testimony at the state trial compelled federal habeas relief, is not an issue worthy of plenary review in this Court.**

Petitioners also ask the Court to grant certiorari to review the second basis for granting the writ of habeas corpus below, the finding that the jury "curative" instruction did not adequately protect respondent's right to a fair trial. Pet. 30-38. Here, there is no claim that the decision below conflicts with the decisions of other circuits, or that the decision is inconsistent with this Court's rulings, or that the decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." S. Ct. R. 10.1.(a). The question presented for review asks the Court to redetermine the question of whether or not a case-specific curative jury instruction was adequate to protect Goldsmith's right to due process after the State erroneously elicited prejudicial inadmissible testimony from its witness. Pet. App. 18-21. Even if the court below erred by "leisurely mischaracteriz[ing] the objected evidence" as Petitioners assert, Pet. 36, this Court is not an error correction court and this question is otherwise not worthy of further review.

Nor is there any case-specific error to be corrected here. Goldsmith was granted relief under the habeas corpus standard for reviewing the efficacy of cautionary instructions given after the introduction of inadmissible testimony. The court below applied

this Court's rule that an instruction directing the jury to disregard inadmissible evidence is presumed to cure any resulting prejudice unless "'there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) (quoting Richardson v. Marsh, 481 U.S. 200, 208 (1987)). Pet. App. 19-20.

The inadmissible evidence that the jury was expected to disregard changed the case dramatically. It told the jury that the police had knowledge that Goldsmith would be in the apartment that they believed was being used to distribute drugs at a specific time. This provided evidence that Goldsmith was personally known to the police and also known to be linked with the apartment and the drug operation before the police even entered the apartment. The inadmissible evidence established that Goldsmith had the right to exercise dominion and control over the apartment and its contents. Thus, the statement filled in the missing pieces of the government's case which otherwise only placed Goldsmith in someone else's apartment with drugs in plain view. Pet. App. 20-21. No jury could be expected to disregard the assurance of a police witness that there was additional evidence of Goldsmith's guilt that was not otherwise before the jury.

The decision below is consistent with the standard set out in Greer. Very substantial doubts whether the State proved

possession with intent to distribute and conspiracy were eliminated by this prejudicial testimony. Because the inadmissible evidence was the most damning evidence of guilt presented to the jury and filled in the "missing link[s]" of evidence that the State was otherwise unable to provide, Pet. App. 20-21, no jury could disregard it. In a case in which the State's evidence was tenuous at best and the punishment imposed so severe,[10] due process at least requires that Goldsmith be retried before an untainted jury that can fairly evaluate this case.

Finally, there is one question concerning the standard of reversal used below which should be addressed. The court below, without discussion, applied both the general Chapman v. California, 386 U.S. 18 (1967), harmless error standard and the more specific "fundamental fairness" due process standard that controls review when there has been a curative instruction, see e.g., Greer, 483 U.S. at 766 n.7. Pet. App. 19-20. Applying both standards, the court below ruled that the introduction of the inadmissible testimony was not harmless error with regard to the possession and conspiracy convictions. Pet. App. 19-21. Earlier this Term, however, this Court decided Brecht v. Abrahamson 123 L. Ed. 2d 353 (1993), and held that Kotteakos v.

---

[10] Goldsmith received concurrent sentences of (1) twenty years and a $20,000 fine for possession of marijuana with intent to distribute; (2) ten years for conspiracy to distribute marijuana; (3) twenty years and a $50,000 fine for possession of cocaine with intent to distribute; and (4) ten years for conspiracy to distribute cocaine. Pet. App. 3.

United States, 328 U.S. 750 (1946), not Chapman, controls harmless error on habeas review of "trial error."[11] The test under Kotteakos is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Kotteakos, 328 U.S. at 776. Chapman is more exacting on the government than Kotteakos because it requires retrial if there is a reasonable possibility that the error contributed to the verdict. Chapman, 386 U.S. at 24.

Nevertheless, erroneous use of Chapman below is irrelevant because it was only one of two reversal standards employed by the court. The court below correctly used the Greer due process "fundamental fairness" standard that applies when a curative instruction is given. The Greer standard requires the habeas petitioner to demonstrate an overwhelming probability that the curative instruction cannot be followed. This standard affords the State greater protection than Kotteakos and remains the correct standard to use, post-Brecht when a curative instruction is involved. Thus, the use of Chapman by the court below had no effect on the outcome since the court also found a "fundamental fairness" due process violation under the more exacting prejudice

---

[11] The use by the court below of two reversal standards can be explained by the fact that there were two issues raised: (1) Whether Goldsmith was denied his right to confrontation; and (2) whether the error occasioned thereby was cured by curative instruction given by the court below. The latter issue is controlled by the Greer standard, the former by Kotteakos as of the Brecht decision.

standard that was and is the appropriate test to use when there has been a curative instruction.[12]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

STEVEN H. GOLDBLATT
Attorney for Respondent

Appellate Litigation Clinical Program
Georgetown University Law Center
111 F Street, NW
Washington, DC 20001-2095
(202) 662-9555

[12] That the reference to Chapman below was irrelevant to the outcome is underscored by the fact that Petitioners have not questioned the standard employed by the court below. Rather, Petitioners argue that the court below erred because the "mandates of harmless error review set forth in Greer v. Miller, [citation omitted] were not carried out," Pet. 31, but make no claim that the court below used an incorrect standard to resolve the issue of prejudice. Under these circumstances and because no issue is presented for review, there is no need to consider whether the reference to Chapman is meaningful.

No. 92-1668

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

S. R. WITKOWSKI, WARDEN, et al.,
Petitioners,

v.

LEWIS D. GOLDSMITH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Certificate of Service

I, Steven H. Goldblatt, a member of the Bar of this Court, hereby certify that on this 1st day of June, 1993 three (3) copies of Respondent's Brief in Opposition were mailed first class, postage pre-paid to Donald J. Zelenka, Esq., Chief Deputy Attorney General, Office of the Attorney General, Rembert C. Dennis Building, P.O. Box 11549, 1000 Assembly Street, Columbia, South Carolina 29211, counsel for petitioners herein. I further certify that all parties required to be served have been served.

Steven H. Goldblatt
Attorney for Respondent

Appellate Litigation Clinical
Program
Georgetown University Law
Center
111 F Street, NW
Washington, DC 20001-2095
(202) 662-9555